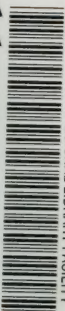


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A SELECTION OF CASES

ON

DOMESTIC RELATIONS AND THE  
LAW OF PERSONS

BY  
EDWIN H. WOODRUFF

PROFESSOR OF LAW IN THE COLLEGE OF LAW, CORNELL UNIVERSITY

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SECOND EDITION, ENLARGED

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NEW YORK  
BAKER, VOORHIS & COMPANY

1905



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## Prefatory Note to the Second Edition.

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This collection, in the present edition, has been enlarged by a group of cases on the conflict of jurisdiction in divorce actions; by other cases which, with three exceptions, have been decided since the first edition was published; and by additional notes and references.

E. H. W.

*August 15, 1905.*

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This collection in the present edition has been enlarged both as to scope and to the number of illustrations in almost all instances; up other cases which have been corrected have been included since the first edition was published, and by additional notes and references.

E. H. W.

London, 1905.



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CASES ON DOMESTIC RELATIONS

AND

THE LAW OF PERSONS.



# CASES ON DOMESTIC RELATIONS

AND

## THE LAW OF PERSONS.

---

### PART I. MARRIAGE.

---

#### CHAPTER I. CONTRACT TO MARRY.

##### *Proof of Contract.*

##### PERKINS *v.* HERSEY.

1 R. I. 493.—1851.

ASSUMPSIT for breach of promise of marriage. Plea, non assumpsit. There was no express promise of marriage proved. Evidence was given that the defendant had been much in the society of the plaintiff, visiting her frequently, walking with her alone, and taking her to ride; that, during the sickness of the plaintiff, the defendant had shown a deep interest in her, and had brought her sister, who resided at a distance, to take care of her; that he had stayed at her father's house at one time for several days, and had continued his attentions to her for nearly two years. The plaintiff then gave birth to a child, alleged to be the child of the defendant, and the defendant discontinued the intimacy.

GREENE, Chief Justice, charged the jury. The plaintiff sets forth in her declaration, mutual promises of marriage made by the plaintiff on one hand, and the defendant on the other, and broken by the defendant, and asks damages for the breach of promise. The plaintiff must first prove the contract on which the action is founded, that is,

[DOMESTIC RELATIONS — I.]

a promise of marriage made by the defendant and accepted by the plaintiff. A contract may be proved either by witnesses who heard it made, or by facts and circumstances from which it may be inferred. It is evident that a contract like the present can generally be proved only in the latter mode. It is made in mutual confidence, in private, in the absence of witnesses. There are some differences in opinion in the courts in regard to the kind of facts which are admissible to prove this promise; but there is no doubt that it may be inferred from circumstances. What then are the circumstances? The ordinary politeness and civility, which a gentleman extends to a lady, are not to be considered as furnishing any proof of such a promise. The safest rule we can lay down is this. If you find that the attentions which the defendant paid the plaintiff, and the intercourse between them, were such as are usual with persons engaged to be married; and such as are unusual with persons between whom there exists no such relation, they are competent for you to consider as evidence which may or may not, as you may determine, suffice to prove a promise of marriage. It is not necessary for you to consider that there was an express promise made and accepted in terms, but if his conduct was such as to induce her to believe that he intended to marry her, and she acted upon that belief, the defendant permitting her to go on trusting that he would carry the intention into effect, that will raise a promise upon which she may recover. But this must be shown by facts and circumstances, and you cannot consider the understanding of the friends of the parties as to the relation between them. If you think there was a promise, you will next have to consider the damages for the breach of it. The promise is as binding as any other; but the damage by breach of it is from its nature not susceptible of pecuniary measurement. If a man promises to pay a sum of money and fails, the damages are the sum promised with interest thereon from the date of the breach of contract. But the damages here do not rest on anything of a pecuniary nature. The amount, therefore, lies very much in your discretion. You will consider the injury done to the plaintiff's feelings—her prospects, her reputation, and her social position, and will give her just such damages as a girl like her, treated as she has been, ought to receive. You will consider what would have been her standing had the defendant married her, and what is her situation now that he refuses. The fact that the plaintiff was seduced you will not consider in this connection. We have a statute which affords the plaintiff a remedy for the injury thus done to her, in a more appropriate form.

Verdict for the plaintiff for \$3,000.



CHURCH, C. J., IN *HOMAN v. EARLE*.

53 N. Y. 267, 273.—1873.

I AGREE with the learned counsel for the defendant that to constitute a promise of marriage substantial proof should be required of the fact. In the case of *Honeyman v. Campbell*, 5 Wils. & Shaw, 144; 2 Dow. & Clark, 282, cited and very much relied upon by the defendant's counsel, the lord chancellor has, I think, correctly stated the law upon the subject. The propositions of the opinion are: 1. That the contract may be proved by direct or by circumstantial evidence. 2. That there must be a serious promise, intended as such by the person making it, and accepted by the person to whom it is made. 3. That mere courtship or even an intention to marry is not sufficient to constitute a contract of marriage. These propositions are entirely sound and do not conflict with the law of the court in this case. The opinion does not attempt to define what circumstances will be deemed sufficient nor from what acts or language a serious promise may be inferred. True, it holds, and I think correctly, that neither courtship nor a mere intention is alone sufficient, but the chancellor says: "But courtship is a most material fact in the case when you are examining whether from the conduct of the parties it appears that a promise had actually passed between them." So, while it is plain that an intention to make a contract is not a contract, yet if such intention is so expressed as that both parties understand it to be a promise, and it is accepted as such, it is as binding as if made in any other form. Parties may select their own language, and if from that and their conduct a legitimate inference may be drawn of their intention and understanding, such intention must be carried out. The expressions in some of the cases, that a contract may be inferred from devoted attention and apparently exclusive attachment, have not been generally adopted by the courts. 15 Mass. 1, note.<sup>1</sup>

ULLMAN *v.* MEYER.

10 FED. REP. 241. (CIRCUIT COURT, S. D., N. Y.) — 1882.

MOTION for a new trial.

WALLACE, D. J. I am constrained to hold that the defendant was erroneously precluded from the benefit of his defence under the statute of frauds on the trial of the action, and that the construction

<sup>1</sup> Upon the sufficiency of evidence, see also *Yale v. Curtiss*, 151 N. Y. 598.

of the statute, which, upon a hasty reading seemed correct, cannot be maintained. The case turns upon the construction of the statute of frauds, the phraseology of which differs from that of the statute of Charles II. It is stated in *Parsons on Contracts*, vol. 3, p. 3, that although provisions substantially similar have been made by the statutes of this country, in no one state is the English statute exactly copied.

It was alleged in the present case, and the evidence tended to show, that by the terms of the agreement of marriage between the parties, the marriage was not to take place until sometime after the expiration of one year. It was held that, by force of the exception in the third section of our statute, promises to marry were not required to be in writing under any circumstances, the view being taken that it was the intention of the statute to withdraw agreements to marry altogether from its operation.

As an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them. Nevertheless, at an early day after such actions became cognizable in courts of law the defence of the statute of frauds was interposed, under that clause of the statute which denies a right of action upon any agreement made upon consideration of marriage unless the agreement is in writing; and though it was held that such clause only related to agreements for marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute. In our own country, in *Derby v. Phelps*, 2 N. H. 515, the question was directly decided, and it was held that although the defence could not be maintained under the marriage clause of the statute, it was tenable under the clause requiring all agreements not to be performed within a year to be in writing. To the same effect are *Nichols v. Weaver*, 7 Kan. 373, and *Lawrence v. Cooke*, 56 Me. 193.

The question has never been presented in our own state, and the ruling upon the trial was made under the impression that the exception in the third clause of our statute was meaningless, unless intended to relate to all the clauses. It was entirely unnecessary if limited to the particular clause in which it is placed, because by the settled construction of the statute the clause did not apply to the excepted class of promises. 1 *Ld. Raym.* 387; 1 *Strange*, 34. When

English statutes, such as the statute of frauds, have been adopted into our own legislation, the known and settled construction of these statutes has been considered as silently incorporated into the acts. *Pennock v. Dialogue*, 2 Pet. 1.

A more careful examination has, however, satisfied me that the only purpose of inserting the exception was by way of explanation, and to remove any doubt as to the meaning of the clause by incorporating into it expressly what would otherwise have been left to implication. This conclusion is more reasonable than the supposition that so important an innovation upon the statute of frauds would have been engrafted so ambiguously. If it has been intended to exclude promises of marriage altogether from the operation of the statute, it could have been plainly evinced by inserting the exception where it would naturally apply to all the classes of contracts required to be in writing; as it is, it more obviously refers to the marriage clause, and the class of promises covered by that clause. It has no necessary relation to the other classes of promises. While the letters of the parties show a marriage engagement, the terms of the engagement and the time of the marriage are not indicated sufficiently to take the case out of the statute. The evidence offered to show that the promise of the defendant was not, by its terms, to be performed within a year, was sufficient to present a question of fact for the jury.

As this question was withdrawn from their consideration, there must be a new trial.<sup>1</sup>

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### *Illegal Consideration.*

BURKE *v.* SHAVER.

92 VA. 345.—1895.

ERROR to Circuit Court, Rockingham County.

Action by Alice E. Shaver against Robert M. Burke. There was a judgment for plaintiff, and defendant brings error. Reversed.

CARDWELL, J. This is a writ of error to a judgment of the Circuit Court of Rockingham county. The action is for a breach of promise of marriage brought by the defendant in error against the plaintiff in error,—the declaration alleging, in aggravation of damages, the seduction of defendant in error, birth of child, etc.,—and at the trial the jury awarded damages in the sum of \$1,000.

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<sup>1</sup> *Contra, Brick v. Gannar*, 36 Hun, 52; *Lewis v. Tapman*, 90 Md. 294.

The first assignment of error is to the refusal of the trial court to give the following instructions, asked for by the defendant (plaintiff in error): Instruction 1. "The jury are instructed that if the plaintiff yielded to the request of the defendant to have sexual intercourse with her upon the promise of the defendant, if the plaintiff got into trouble, he would marry her, such contract did not constitute a legal contract of marriage." Instruction 2. "The jury are instructed that, upon an agreement between a single man and a single woman to have illicit intercourse, and that, if pregnancy of the female shall follow, the man agrees to marry the woman, such agreement is against morality, and does not create a legal contract of marriage."

The first question to be determined is whether these instructions correctly propound the law applicable to the case. A contract for marriage is the mutual agreement of a man and a woman to marry each other, or become husband and wife, in the future, and must satisfy the legal requirements as to parties, consideration, etc., as other contracts must. Wharton, in his work on the Law of Contracts (volume 1, sec. 373), states the law thus: "An agreement is void when the consideration is future illicit cohabitation, no matter what other considerations may unite, or how skillfully the illegal object might be clothed. \* \* \* A promise of marriage on consideration of sexual intercourse also is void." Chancellor Kent, in his Commentaries (volume 2, 13th ed., p. 467), in discussing what constitutes a valuable consideration of a contract, says: "The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law, or sound policy, or good morals. '*Ex turpi contractu, actio non oritur*;' and no person, even so far back as the feudal ages, was permitted by law to stipulate for iniquity. The reports in every period of English jurisprudence and our American reports equally abound with cases of contracts held illegal on account of the illegality of the consideration, and they contain certain striking illustrations of the general rule that contracts are illegal when founded on a consideration *contra bonos mores*, or against principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law. If the contract grows immediately out of, or is connected with an illegal or immoral act, a court of justice will not enforce it." In the case of *Saxon v. Wood* (Ind. App.), 30 N. E. 797, where the complaint alleged "that defendant, who was a suitor of plaintiff, an unmarried woman, solicited her to have sexual intercourse with him, and on her refusal, agreed that if she would yield to his wishes, and thereby became pregnant, he would at once marry her; that in consideration of such agreement, to which she consented, plaintiff yielded to de-



fendant's solicitations, and did have sexual intercourse with the defendant, from which pregnancy resulted, and from which a child was born to plaintiff, and the defendant, on her request to fulfil his agreement, refused to marry her," — it was held that the action would not lie, the contract being based on an immoral consideration. Judge Black, in delivering the opinion of the appellate court of Indiana, in that case, cites with approval what has above been quoted from Kent's Commentaries, and a number of other authorities on the same line.

In the case of *Hanks v. Nagle* (decided by the Supreme Court of California), 54 Cal. 31, which was an action for a breach of promise of marriage similar in many respects to the case at bar, the plaintiff testified, in effect, that the defendant promised to marry her if she surrendered her person to him, and that she thereupon consented. The court held that promise was void on account of the immorality of the consideration, the court saying, in its opinion, that "upon well-settled principles the plaintiff should not have recovered on a contract of this character, as, being a contract for illicit cohabitation, it is tainted with immorality." Citing Story on Cont. sec. 458, and *Steinfelt v. Levy*, 16 Abb. N. S. 26. In the latter case, which was decided by the Supreme Court of New York, Chief Justice Neilson, in discussing the nature of the contract sued on, says: "It is hardly necessary to say that a contract thus grossly immoral would not support the action." "The learned presiding judge [of the court below] seems to have had in view the rule that where a contract is founded on two considerations, one of which is merely void, but not vicious, and the other good, the contract is binding to the extent of the good consideration. He ruled that if, in fact, mutual concurrent provisions to marry were a part of the consideration, the plaintiff could recover. It does not seem to have occurred to him that such a rule would tend to legalize contracts for prostitution, or that the principle in view is never applied to a contract tainted with immorality. Courts of justice will not aid the illicit or corrupt arrangement, or sift one part of it to save the other part."

The learned counsel for defendant in error cites this case as authority for his contention that instructions 1 and 2 were not applicable to the case at bar, because there was a promise of marriage, independent of the promise made in consideration of sexual intercourse; but the case of *Steinfelt v. Levy* sustains the doctrine laid down in *Hanks v. Nagle*, and the other authorities above cited. Moreover, we shall see, later on, that the evidence does not show a promise in the case at bar, by the plaintiff in error, to marry the defendant in

error, independent of the promise to marry her if she would have sexual intercourse with him, and became pregnant. The cases of *Kurtz v. Frank*, 76 Ind. 594, and *Clark v. Pendleton*, 20 Conn. 495, are also cited by counsel for defendant in error, but they do not apply to the case at bar. In the first of these cases the man promised to marry the woman in September or October, if they could agree and get along and be true to each other, and that if she became pregnant from their intercourse he would marry her immediately. She became pregnant in July, but he then refused to marry her. The court held, upon the particular facts in that case, that the illicit intercourse did not so enter into the consideration as to render the agreement void; that an action for the breach accrued at once. The real point decided was that the plaintiff could maintain her action upon the defendant's refusal to marry her after pregnancy, without waiting until the time fixed upon for the marriage by the original agreement. We think that instructions Nos. 1 and 2 correctly propounded the law.

It only remains to be determined whether the instructions are relevant to the testimony in the case. Instructions founded on evidence in the case, and consistent with the law, are proper, and should be given; but otherwise, where they have no basis in the evidence. *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; *Priest v. Whitaker*, Id. 151; *Birch v. Linton*, Id. 584; *Rosenbaums v. Weeden*, 18 Grat. 785.

The testimony of the plaintiff (defendant in error) is as follows: On examination in chief she says that these improper relations (illicit intercourse) commenced in July, 1890; that they occurred afterwards, and continued up to the last of March, 1892. "He said that he was going to marry me if I would consent. He often made that statement. Q. Were you engaged to him at the time of the first act of improper intercourse, in July, 1890? A. I asked him if he would be true to his promise, and he said that he would; that he was going to marry me anyway. Q. Did he say anything about marrying you the last time your relations with him were improper, in March, 1892? A. He said that he would be true to his promise." On cross-examination she says that nothing was ever said about the time,— "only he said, if I got into trouble, he would marry me. Q. You mean in a family way? A. Yes, sir. Q. And you were satisfied with this arrangement? A. Yes, sir. Q. When did he tell you this? A. He told me in the first beginning, in July, 1890. He promised me this the first time, and he promised me afterwards." Then in answer to the question propounded by the court, "You say the first time Burke had intercourse with you he promised to marry you?" she answers, "Yes, sir." And then, on

re-examination, she stated, "that when the first act of intercourse took place Burke said he was going to marry her; that she asked him when he' was going to marry her, and he said 'when she got in trouble.' He said he was going to marry me anyway."

This is substantially all the testimony as to the promise of marriage, or the seduction, and it will be noted that the plaintiff said nothing as to any promise (or engagement) of marriage prior to the first act of illicit intercourse, in July, 1890. On the contrary she says, in answer to the cross question, "Was anything said about getting married between June, 1889 (the first time she met him), and July, 1890?" "He expressed his affections that way. We were not particularly engaged." It appears, therefore, that the question was directly raised by the evidence, whether or not this alleged promise of marriage was made in consideration of sexual intercourse, or upon condition that she became pregnant, which question was to be determined by the jury, and the defendant had a right to have the jury instructed as to the law that was to guide them in determining that question; and as instructions Nos. 1 and 2 correctly propounded the law, they should have been given to the jury. The refusal to give these instructions was error.

The defendant also asked the court to instruct the jury as follows: Instruction No. 3. "The jury are instructed that if they believe from the evidence that no day was fixed for the marriage, the plaintiff must prove that she offered to fix the time and place of marriage, and that, in default of such offer to fix the time and place of the marriage, there is no breach of the contract, and the plaintiff cannot recover." In the abstract this instruction embodies the law, but we do not think, upon the testimony in this case that it applies. Where one repudiates his promise and declares that he will not be bound by it, the party not in default need not wait for the time of performance to arrive, and, where the engagement is general, need not request the fulfillment of the promise, but may sue at once. 2 Am. & Eng. Enc. of Law, 524, and cases cited. The evidence here is that the defendant denied *in toto* the alleged promise of marriage before this action was brought. The instruction was, therefore, properly refused.

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Judgment in this case must be set aside and annulled, and the case remanded to the Circuit Court of Rockingham county for a new trial, to be had in accordance with this opinion.

KELLEY *v.* RILEY.

106 MASS. 339.—1871.

CONTRACT for breach of promise of marriage. The declaration did not allege special damage.

At the trial in the Superior Court, before Judge Brigham, C. J., evidence was introduced tending to show that the defendant was a married man at the time of the promise. The defendant requested the judge to rule that, if the defendant was married at the time of the promise, the action could not be maintained; but he declined so to rule, and ruled that the action could be maintained, although the defendant was married at the time of the promise, if the plaintiff was ignorant thereof.

The plaintiff offered evidence tending to show that, induced by the defendant's promise of marriage, she submitted to sexual intercourse with him, and that he got her with child, of which she had been delivered and which was now living. The defendant objected to the admission of this evidence; but the judge admitted it, as affecting the measure of damages.

In submitting the case to the jury, the judge instructed them as follows:

" Promises of marriage, not often being made in the presence of witnesses or in writing, have usually, in cases of this nature, been proved by circumstantial evidence. As the promise of the plaintiff is the consideration of the promise of the defendant, both must be proved in order to support the action; and each promise may be established by the same species of proof; and the conduct and deportment, as well as the language of the parties, towards each other, may furnish satisfactory evidence of the fact that a mutual promise of marriage has been made between them, that is, a promise of marriage by one and a corresponding promise of marriage by the other.

" In determining what sum of money would reasonably indemnify and compensate the plaintiff for a breach of the defendant's contract with her, the jury may consider, in addition to her expenditure in preparing, the disappointment of her reasonable expectations, and inquire what she has lost by her disappointment, and for that purpose consider among other things what would be the money value or worldly advantage (separate from considerations of sentiment and affections) of a marriage which would give her a permanent home, and the advantage of such a domestic establishment as would be suitable to her as the wife of a person of the defendant's estate and



station in life. The jury ought also to consider whether her affections were in fact implicated, and whether she had become attached to the defendant, and if such was the fact, the wound and injury to her affections would be an additional element in the computation of her damage; and also to consider whatever mortification, pain or distress of mind she suffered, resulting from the discovery of the defendant's inability to marry, by reason of his living wife, or his refusal to marry her within a reasonable time after the contract was made between them, if he was not disabled from doing so by reason of a living wife. And if, while the parties were mutually promised in marriage, and intending and expecting marriage in a short time, the defendant solicited, in consideration of such intention and expectation, and the plaintiff permitted, in consideration of such expectation and intention, sexual intercourse with her, whereby she became pregnant with a child, which was born alive, and is now living, these facts may be considered by the jury in computing damages, so far as they tend to aggravate and increase the disappointment, mortification, pain or distress of mind, which she has suffered by reason of the defendant's breach of contract."

A verdict for the plaintiff was returned September 23, 1870, and the defendant alleged exceptions; on September 27 the plaintiff moved for judgment; on October 1 the judge extended the time for filing the exceptions till October 3, on which day they were filed, and on the same day, a few hours afterwards, the defendant died. The plaintiff then asked for judgment on her motion, and contended that the defendant's exceptions ought not to be allowed, but on October 14 the attorney who appeared for the defendant at the trial presented the exceptions for allowance, and on October 17 the judge allowed them. The defendant died intestate, and no steps towards taking out administration on his estate were had before the filing [the allowance ?] of the exceptions. To the refusal of the judge to grant her motion, and to his allowance of the defendant's exceptions, the plaintiff alleged exceptions.

COLT, J. Both parties present exceptions. The defendant died after his exceptions, taken during the trial of the case to the jury, were filed in the court below, and before they were allowed by the presiding judge. The action could not be continued to summon in the administrator, because, as no special damage is alleged, it does not survive. The authority of the attorney employed by the defendant, of course, terminated with his death. *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408. The plaintiff under these circumstances excepts both to the allowance of the defendant's exceptions, and the refusal of the judge to order judgment on the

verdict, upon her motion, which was filed before the defendant's death.

As a matter of practice, at common law, as well as under the provisions of the Gen. Sts. c. 133, sec. 7, and c. 115, sec. 14, judgment will be entered on the verdict on motion, as of a preceding day or term of the court, whenever an action, continued or postponed for the purpose of obtaining a disposition thereof, which may relieve a dissatisfied party from a verdict, would otherwise fail by the death of a party to it. So, if the death occur after verdict, delay during the time taken for the argument of law questions upon which the validity of it depends, or for advisement thereon, will not be suffered to deprive one of the benefits to which he appears to have been justly entitled under it. *Springfield v. Worcester*, 2 Cush. 52; *Carrier v. Lowell*, 16 Pick. 170.

This case comes within these rules. The defendant's exceptions were presented and filed before the death of the defendant, judgment on the verdict was thereby delayed, and the court in now rendering judgment will go back to the time when it would have been rendered if no action had been taken to prevent it.

This all proceeds on the supposition that the verdict is one which is open to no legal objection. When objections are suggested by exceptions regularly taken and filed, then it is manifestly proper that the order for judgment, as of a prior day or term, should not be made until the exceptions are regularly disposed of by a decision in favor of the verdict. And although technically there can be no appearance for a deceased party, yet this court will pass upon the questions so submitted, and hear suggestions as to their merits, from any one who holds the office of an attorney within the court.

The exceptions of the defendant were therefore properly allowed, and the motion for judgment properly denied, for the time, as premature.

It remains to dispose of the exceptions of the defendant, taken at the trial. The court was asked to rule that, if the defendant was a married man at the time of his promise, the plaintiff could not be injured by a failure to perform, and though she had no knowledge of the fact at the time, could not maintain this action. This was properly refused. The defendant is not permitted to escape responsibility on the ground of his present legal inability to perform a promise of marriage to an innocent party. The damages to the plaintiff are certainly not diminished by the consideration that the promise was made under such circumstances. The strict rule that a consideration to support a promise is insufficient if its performance is utterly and naturally impossible, is met by the suggestion, that

even if the future performance here is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the plaintiff in relying for any time on the promise affords sufficient consideration to support the defendant's contract. 2 Parsons on Contracts (5th ed.), 67; *Wild v. Harris*, 7 C. B. 999.

The defendant also insists that the evidence of seduction was not admissible in aggravation of damages. But in a recent case the contrary has been held by this court, on the ground that compensation to the plaintiff for the injury she has received by the breach of the contract cannot be fully reached without taking into account the situation in which she is left by the defendant's act. *Sherman v. Rawson*, 102 Mass. 395. The instructions actually given by the learned judge, as to the nature of the evidence by which the promise was to be proved, and the elements to be considered by the jury in estimating the damages, were full and accurate.

The defendant's exceptions are accordingly overruled, and the plaintiff may now therefore renew her motion in the Superior Court, where the case remains, that judgment be rendered as of the day and term when the verdict was returned.

Ordered accordingly.<sup>1</sup>

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## POLLOCK v. SULLIVAN.

53 VT. 507.—1881.

ACTION on the case. Heard on demurrer at the September Term, 1880, ROYCE, J., presiding. The court, *pro forma*, sustained the demurrer.

REDFIELD, J. The declaration counts tortwise, for fraud and deceit, whereby the plaintiff has suffered injury. It avers, in substance, that the defendant, professing to be an unmarried man, paid his addresses to the plaintiff and offered himself in marriage to her, and that she, believing his pretensions and representations to be true, accepted his proffer, and agreed to marry him; and that, in fact, defendant at that time was living with his wife and children at St. Albans; and thereby she was defrauded and injured. To this declaration the defendant files a general and special demurrer.

We have not carefully examined the several counts, to find whether some of them may not be technically defective under *special* demurrer, but we think some of them may withstand that assault. The plaintiff avers fraud, and damages thereby occasioned. Fraud occasioning damage and injury, is actionable; otherwise persons may suffer injury by the wrongful acts of others, and the law afford no

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<sup>1</sup> Upon the measure of damages, see also *Coolidge v. Neat*, 129 Mass. 146.

redress. This would bring the laws of the land into contempt. The demurrer confesses the truth of the facts alleged in the declaration. And we think the facts averred being true, are actionable. The facts alleged show that the plaintiff is wanting in discretion, if not in some of the more cardinal virtues; but that is all for the jury, and outside the law of the case. On demurrer to her averments and complaints, she is to be regarded as an innocent person, deceived and defrauded.

The defence claims that the action should have been *assumpsit* for the breach of the contract. The adjudged cases seem to establish that the innocent party, in such case, may sustain an action for a breach of the promise of marriage; that the other party will not be permitted to allege that he cannot perform *his contract* because he had a wife when he agreed to marry another. If such action was brought, and the defendant should be foolhardy enough to offer to perform his contract, the plaintiff must desist, or subject herself to a criminal prosecution. The essential wrong to the plaintiff is, not that she has not attained a husband, as she expected; but that she spent her time and money in arrangements and preparation for marriage with the defendant, when, in fact, he had then and now a wife, and was deluded into this relation by the fraud and falsehood of the defendant, and by such deception and fraud she has suffered grievously in property and reputation. This action is appropriate to redress this species of wrong. Whether the plaintiff has a character that can be impaired, or lost, can be ascertained in the proper forum before a jury. *Howard v. Gould*, 28 Vt. 523; 1 Hil. on Torts, p. 3, note a; Sedgw. on Dam. p. 48, and cases there cited; Chit. on Cont. 10th Am. ed., p. 750.

The result is, the judgment of the County Court is reversed, and the demurrer overruled. The defendant, at the hearing, asked leave to replead, in case the judgment should be against him; the leave will be granted, on the usual terms, and the case is remanded.<sup>1</sup>

### *Reality of Consent.*

#### VAN HOUTEN *v.* MORSE.

162 MASS. 414.—1894.

CONTRACT, for breach of promise of marriage. At the trial in this court, before Barker, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

MORTON, J. The defence principally relied on in this case is that the promise which the jury have found was made was induced by

<sup>1</sup> Accord, *Blattmacher v. Saal*, 29 Barb. 22. No action will lie if plaintiff knew defendant had a divorced wife living, *Haviland v. Hallstead*, 34 N. Y. 643.



fraudulent conduct and representations and concealments on the part of the plaintiff with reference to various matters relating to her past life, to her parentage and family, and to her position and circumstances. The defendant contends that the instructions of the court as to what constituted fraudulent concealment were not sufficient, and that certain requests which he made should have been given.

The jury were correctly instructed that it was not the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life; and that the parties would be bound, if they became engaged without making any investigations, and without receiving any assurances or representations which led to the engagements, even though matters were discovered subsequently which, if known at the time, would have prevented the engagement, unless they were such as gave a right to the other party to terminate the contract upon their discovery. Whether the only matters which would give the defendant such a right were those relating to the chastity of the plaintiff, we have no need now to consider. No question was made by him as to the plaintiff's chastity; and the fact, if it was a fact, that the plaintiff had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or that there was incompatibility resulting from disparity of age, difference in character and disposition, and other causes, which, apart from fraud, were the things relied on by the defendant, would not justify him as matter of law in breaking the contract. *Reynolds v. Reynolds*, 3 Allen, 605; *Coolidge v. Neat*, 129 Mass. 146; *Gring v. Lerch*, 112 Penn. St. 244; *Berry v. Bakeman*, 44 Me. 164; *Leeds v. Cook*, 4 Esp. 256; *Baker v. Cartwright*, 10 C. B. (N. S.) 124; *Beachey v. Brown*, El., Bl. & El. 796; *Young v. Murphy*, 3 Bing. N. C. 54; *Bench v. Merrick*, 1 C. & K. 463. See also 2 Am. & Eng. Ency. of Law, 525, 526, for collection of cases. But in respect to what would, in view of the circumstances of this case, be such concealment on the part of the plaintiff as to constitute fraud, we think that the instructions hardly went far enough, or at least that it was possible that the jury may not have understood them as they were perhaps intended by the court to be understood. The jury were instructed that if the engagement was brought about, in whole or in part, by false representations, by concealments upon matters which were inquired about, or which the party had by universal consent the right to know, then the contract could not be enforced. And later they were told that the defendant was not bound if the contract was procured by deception or by fraud, or by concealment which was fraud,

but that there was no fraudulent concealment by simply not communicating information; that a promise would be valid, though made in complete ignorance of the antecedents of the parties, but that there was a different doctrine where matters were inquired about; and that, if either party made inquiries of the other with reference to family, position, or circumstances in the life or experience of the other, then, if wilful false statements were made with reference to any of those things which might fairly be considered as entering into the judgment of either party as to whether that party would or would not enter into a contract of marriage, then there would be a false representation. "That is," the court continued, "a statement which the party knows is false, or makes as true of his or her own knowledge, when it is in fact untrue, and without knowing that it is true, or if there is concealment of any such particular which is inquired about, those circumstances will be sufficient to make void a contract entered into in consequence and relying upon them, unless they are of such a nature that no man would be justified in the exercise of any reasonable care in relying upon these statements." These instructions might, and probably would, lead the jury to infer that concealment on the part of the plaintiff would not constitute fraud, except as to matters that were inquired about by the defendant.

But we think that if the plaintiff undertook, without inquiry from the defendant, to state facts relating to any circumstances in her history or life, or to her parentage or family, or to her former or present position, which were material, she was bound not only to state truly the facts which she narrated, but she was also bound not to suppress or conceal any facts which were necessary to a correct understanding on the part of the defendant of the facts which she stated; and if she wilfully concealed and suppressed such facts and thereby led the defendant to believe that the matters to which such statements related were different from what they actually were, she would be guilty of a fraudulent concealment. *Kidney v. Stoddard*, 7 Met. 252; *Short v. Currier*, 153 Mass. 182; *Burns v. Dockray*, 156 Mass. 135, 137; *Prentiss v. Russ*, 16 Me. 30; *Atwood v. Chapman*, 68 Me. 38, 40, 41; *Potts v. Chapin*, 133 Mass. 276; *Clark v. Baird*, 5 Seld. 183; *Brown v. Montgomery*, 20 N. Y. 287; *Devoe v. Brandt*, 53 N. Y. 462; *Hill v. Gray*, 1 Stark. 434; *Stevens v. Adamson*, 2 Stark. 422; *Arkwright v. Newbold*, 17 Ch. D. 301, 317, 318; *Aortson v. Ridgway*, 18 Ill. 23. Add. Torts, Wood's Edition, 1205.

Mere silence on the part of the plaintiff, without inquiry by the defendant, though resulting in the concealment of matters, which would have prevented the engagement if known, would not consti-

tute fraud on her part. *Potts v. Chapin, ubi supra*. But a partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, would be as much of a fraud as actual misrepresentation, and in effect would be misrepresentation. *Arkwright v. Newbold, ubi supra*.

There was evidence that the plaintiff represented to the defendant before the engagement that she had been previously married, and had lived with her husband in Spokane and other places five or six years, and that a few weeks before she left Spokane for Boston she had obtained a divorce from him on account of his bad conduct and cruelty to her. So far as appears from the exceptions, that was all that the plaintiff told the defendant about the divorce before the engagement. But there was testimony tending to show that at the same time she procured a divorce from her husband he procured one from her, and that the cross bill filed by him in answer to her complaint, and on which his divorce was granted, charged her with being a woman of violent and ungovernable temper, and of jealous, revengeful and vicious disposition, and with having, within two weeks after her marriage, commenced a systematic course of violent, abusive, and cruel conduct towards him, which finally broke down his health, and compelled him to leave her. He also charged her with assaulting him with a carving knife, and with using profane epithets in regard to himself, his relatives and friends, and alleged numerous specific acts of violence and passion.

We think that the divorce which her husband obtained from the plaintiff and the charges contained in the cross bill were material facts, and that if the plaintiff knew them when she told the defendant that she had obtained a divorce from her husband for his cruelty, and wilfully suppressed them, she was guilty of a fraudulent concealment and misrepresentation. To say that she had obtained a divorce from her husband for his cruelty, and omit all reference to his divorce and the grounds on which he obtained it, was to state the matter in such a way as to convey a different impression from that which would have been conveyed if all the facts had been stated, and was misleading. Though it does not appear very clearly from the exceptions whether she did or did not know of the divorce which her husband had obtained from her, and of the charges which he made in his cross bill, it is fairly to be inferred that she was not ignorant either of the divorce or of the charges. There was testimony tending to show that, when the defendant informed her of them, she did not express ignorance of them, but said that they were not true, and the trial seems to have proceeded on the assumption that she knew of them. Moreover, though possible, it is hardly

probable that she was unacquainted with the fact that he had obtained a divorce, or with the grounds on which he got it.

So with regard to her parentage and family. She was under no obligation to tell the defendant about them in the absence of inquiry by him. But if she voluntarily undertook to make any statements concerning them, she was bound not only to state truly what she told, but also not to suppress or conceal facts which would materially qualify those which she stated. If, for instance, as the evidence tends to show, she told the defendant that her father and mother were both of the best white families in Charleston, South Carolina; that her father was a distinguished lawyer; that her mother was equally high bred; and that after his death her mother married a man by the name of Smith, with which marriage her mother's folks were dissatisfied, and that on that account the family moved to California;—but if she suppressed the fact that Smith was a colored barber and an octoroon and her reputed father, and that her mother had negro blood in her veins, and was about one-eighth negro, the impression as to the standing of herself and family, and the credibility of her statement respecting her parentage, would or might be quite different from that which would be likely to be the case if she had told the whole truth. These facts, if they were facts, were necessary to a correct understanding of the real state of the circumstances of her family and of her previous history, and were or might be found to be material; and a wilful suppression of them on her part, in view of what there was evidence that she told would constitute or might be found to constitute a fraud upon the defendant. *Wharton v. Lewis*, 1 C. & P. 529.

The defendant's requests did not state the law with entire correctness, and did not direct the attention of the court particularly to the effect of suppression by the plaintiff of facts which would materially modify those which she voluntarily told the defendant respecting the divorce and her parentage and family. They did, however, call for instructions as to what would constitute fraudulent concealment in respect to those matters, and it is evident from the charge that the court understood them to do so. In giving its instructions the court stated the law in reference to things that were inquired about in such a manner that the jury might infer that as to matters not inquired about the suppression of material facts would not constitute fraudulent concealment. As to an important phase of the case this was erroneous, and the jury may have been misled by it; and though the defendant did not call the attention of the court to that aspect of the case any more than to what would constitute fraudulent concealment, in case inquiry was made, we think that the whole



matter was fairly within the scope of his requests, and that he might well assume that the instructions as given stated, in the opinion of the court, the rules of law properly applicable to it. *Cork v. Blossom*, ante, 330. The court are not unanimous in their view of the questions presented by the bill of exceptions, or in their construction of the judge's charge, but there is no difference of opinion with regard to the principles of law to be applied to the case.

Among other rulings which the defendant requested was the following: "If mutual promises to marry were made, and the defendant was influenced to do so by the fraud or deception of the plaintiff as to her life, lineage, character, traits of character, or property, or former condition of life, his promise does not bind him." In reference to this the court said: "That I should give with the qualification which I have made generally upon the subject. I think there is nothing objectionable in that." We understand that by "the qualification" referred to was meant what the court had said previously in regard to its not being the duty of a party, before making or accepting an offer of marriage, to communicate all the previous circumstances of his or her life, and that a party would not have the right to terminate a contract to marry on the ground of fraud, upon subsequently discovering matters which, if seasonably known, might have prevented the engagement, though not sufficient to justify a party in breaking it off. As thus qualified the instruction was correct, and the defendant had no proper ground of exception. But we do not think that it meets the objections of the defendant to the sufficiency of the charge in regard to what constituted fraudulent concealment.

The exceptions state that "the jury were instructed at length upon the law applicable to actions for breach of promise of marriage, to which instructions no objection was made, except as appears by the bill of exceptions." We do not understand from this that any instructions on the matter of fraud which were deemed material upon any of the questions raised by the defendant are omitted from the bill of exceptions, but we infer that all of the instructions pertinent to the requests and contentions of the defendant on that subject are included in the exceptions.

We discover no error in the instructions, or rulings or refusals to rule, or in the admission of evidence, or in the conduct of the trial, except as above stated. \* \* \* Exceptions sustained.<sup>1</sup>

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<sup>1</sup> "If a man ignorant of the real character of a woman enters into an agreement of this nature [to marry] and afterwards discovers her to be lewd and unchaste, it is sufficient justification for him to refuse compliance with it." — *Budd v. Crea*, 6 N. J. L., 450, 455.

For disease as justification for breach of promise, see *Shackleford v. Hamilton*, 93 Ky. 80. (s. c. with note, 15 L. R. A. 531.)



*Survival of Action for Breach of Promise.*

## STEBBINS v. PALMER.

1 PICK. (MASS.) 71.—1822.

JULIA PALMER, the respondent, brought an action for breach of promise of marriage against Benjamin Stebbins, who died while the action was pending. Nearly two years after his death, she made application to the judge of probate representing that no person had taken out letters of administration on his estate, that she was a creditor, and that at the time of his death she had an action pending against him, which had been continued from time to time, to enable her to summon in any person who should be appointed administrator; and praying that letters of administration might be granted to such person as the judge should think proper. It was accordingly decreed that letters of administration should be granted. Marytta Stebbins, the widow of Benjamin, having omitted to appeal from this decree in the ordinary way, now petitioned the court for leave to enter an appeal, pursuant to St. 1817, c. 190, sec. 8, alleging that her omission arose from mistake. And whether justice required a revision of the decree, depended on the question, whether the respondent was interested as a creditor in the estate of the deceased.

WILDE, J. [After stating the grounds on which the court thought it reasonable that the petitioner should be permitted to enter her appeal, in conformity with St. 1817, c. 190, sec. 8, if she could show that justice required a revision of the decree, he proceeded]:

This she attempts by referring us to the grounds on which the decree is founded, which, her counsel have argued, are insufficient in law to sustain it. They contend, that no one interested in the estate is desirous that administration should be granted, and that there is no necessity for incurring such an expense. If this has been made to appear, the decree ought to be reversed.

Generally, administration ought not to be granted, except on the application of some one entitled to administration, or who is interested in the estate to be administered upon. The question then is, whether the respondent is interested in, or has any claim upon, the estate of the deceased. At the time of his decease she had an action against him pending in this court, founded on the breach of a promise of marriage; and if this action by law survives, there is good ground for granting letters of administration, whether strictly speaking she is a creditor or not; for in such case justice would require

that administration should be granted, so that the action might be prosecuted to final judgment. The principal question, therefore, is, whether such an action by law survives.

The maxim, *actio personalis moritur cum persona*, decides nothing, for it is admitted that it is not applicable generally to contracts; and, although it commonly does apply, where the cause of action is a tort, or arises *ex delicto*, yet in many such cases the tort may be waived, and in an action founded on the principles of civil obligation, damages may be recovered for trespass. Where there is a duty, as well as a wrong, an action will survive against the executor. He is responsible for the debts of the deceased, and for all undertakings and acts that create a debt, as far as there are assets. And it seems to make no difference, whether the debt be certain or uncertain, or whether it arises from a promise express or implied. If the cause of action has been beneficial to the testator, the executor shall be charged. "Where," says Lord Mansfield, "besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor; but if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury." Cowp. 376. The distinction seems to be between causes of action which affect the estate and those which affect the person only; the former survive for or against the executor, and the latter die with the person.

According to this distinction, an action for the breach of a promise of marriage would not survive; for it is a contract merely personal; at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling in substance deceit than fraud, than a mere common breach of promise. The damages may be, and frequently are, vindictive; and, if they could be proved against the executor, might render the estate insolvent, to the loss and injury of creditors. For these and other reasons, it has been settled, in England, that such an action does not survive for an executor. If this is rightly settled, it is decisive, for the law is unquestionably the same, whichever party may die.

The case of *Chamberlain v. Williamson*, 2 M. & S. 408, was considered as an action of the first impression; which shows at least what the law was supposed to be before. This is a consideration of no small weight, which, joined to the principles and reasoning of that case, is entirely convincing.

The respondent has laid no special damages in her declaration, and has not averred in her application to the judge of probate that

she has sustained any; if she has any proof to support such an averment, she may apply anew to the judge of probate, and, if administration should be granted, may commence a new action. Whether in such an action for special damages she would be allowed to recover full damages or would be restricted to those which relate to property, we do not now determine.<sup>1</sup>

Decree of judge of probate reversed.

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<sup>1</sup> See also *Hayden v. Vreeland*, 37 N. J. L. 372; and *Kelley v. Riley*, *supra*. In *Wade v. Kalbfleisch*, 58 N. Y. 282, the court says: "Although in form this action resembles an action on contract, in substance it falls within the definition of the exception, as an action on the case for personal injuries. It is unnecessary to classify it. It is properly termed *sui generis*. The form of the action is not material. The controlling consideration is that it does not relate to property interests, but to personal injuries. In *Zabriskie v. Smith*, 13 N. Y. 322, Denio, J., in delivering the opinion of the court specifies this as an action where the damage consists entirely of personal suffering and cannot therefore be revived."

## CHAPTER II.

### CONTRACT OF MARRIAGE.

#### *Marriage as a Contract.*

MAYNARD *v.* HILL.

125 U. S. 190.—1887.

[*Reported herein at p. 304.*]

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#### *Common Law Marriage.—Requisites of Form.*

MEISTER *v.* MOORE.

96 U. S. 76.—1877.

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

This was ejectment brought October 9, 1873, by Bernard L. Meister, for the possession of certain lots of ground in Pittsburg, Pa. Both parties claimed under William Mowry; the plaintiff, as the alienee of the alleged wife and daughter of said William, and the defendants, as the vendees of his mother, in whom the title of the property vested, if he died unmarried and without issue.

MR. JUSTICE STRONG delivered the opinion of the court.

The learned judge of the Circuit Court instructed the jury, that, if neither a minister nor a magistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian Pero, the marriage was invalid under the Michigan statute; and this instruction is now alleged to have been erroneous. It certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract *per verba de præsenti*. That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country, from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that, where a statute creates a right and provides a remedy for its

enforcement, the remedy is exclusive. No doubt, a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publications of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of a nullity. This is the conclusion reached by Mr. Bishop, after an examination of the authorities. Bishop, Mar. and Div., sec. 283 and notes. We do not propose to examine in detail the numerous decisions that have been made by the state courts. In many of the states, enactments exist very similar to the Michigan statute; but their object has manifestly been, not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases, the leading purpose is to secure a registration of marriages, and evidence of which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry. In a small number of the states, it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so in North Carolina and in Tennessee, where the statute of North Carolina was in force. But the statute contained a provision declaring null and void all marriages solemnized as directed, without a license first had. So, in Massachusetts, it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner directed by the written law. *Milford v. Worcester*, 7 Mass. 48. It may be well doubted, however, whether such is now the law in that state. In *Parton v. Henry*, 1 Gray (Mass.), 119, where the question was, whether a marriage of a girl only thirteen years old, married without parental consent, was



a valid marriage (the statutes prohibiting clergymen and magistrates from solemnizing marriages of females under eighteen, without the consent of parents or guardians), the court held it good and binding, notwithstanding the statute. In speaking of the effect of statutes regulating marriage, including the Massachusetts statute (which, as we have said, contained all the provisions of the Michigan one), the court said: "The effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But, in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though had in violation of the specific regulations imposed by statute." There are two or three other states in which decisions have been made like that in 7th Massachusetts.

We will not undertake to cite those which hold a different doctrine, one in accord with the opinion we have cited from 1 Gray. Reference is made to them in Bishop, Mar. & Div., sec. 283, *et seq.*; in Reeve's Domestic Relations, 199, 200; in 2 Kent, Com. 90, 91; and in 2 Greenleaf on Evidence. The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf: —

"Though in most, if not all, the United States there are statutes regulating the celebration of marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered, that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage, regularly made according to the common law, without observing the statute regulations would still be a valid marriage."

As before remarked, the statutes are held merely directory; because marriage is a thing of common right, because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law.

The Michigan statute differs in no essential particular from those of other States which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or magistrate. It does not deny the validity

to marriages which are good at common law. The most that can be said of it, that it contains implications of an intention that all marriages, except some particularly mentioned, should be celebrated in the manner prescribed. The sixth section declares how they may be solemnized. The seventh describes what shall be required of justices of the peace and ministers of the gospel before they solemnize any marriage. The eighth declares that in every case, that is, whenever any marriage shall be solemnized in the manner described in the act, there shall be at least two witnesses present beside the minister or magistrate. The ninth, tenth, eleventh, sixteenth, and seventeenth sections provide for certificates, registers, and exemplifications of records of marriages solemnized by magistrates and ministers. The twelfth and thirteenth impose penalties upon justices and ministers joining persons in marriage contrary to the provisions of the act, and upon persons joining others in marriage, knowing that they are not lawfully authorized so to do. The fourteenth and fifteenth sections are those upon which most reliance is placed in support of the charge of the Circuit Court. The former declares that no marriage solemnized before any person professing to be a justice of the peace or minister of the gospel shall be deemed or adjudged to be void on account of any want of jurisdiction or authority in such supposed minister or justice, provided the marriage be consummated in the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. This, it is argued, raises an implication that marriages not in the presence of a minister or justice, or one professing to be such, were intended to be declared void. But the implication is not necessarily so broad. It is satisfied if it reach not beyond marriages in the mode allowed by the act of the legislature.

The fifteenth section exempts people called Quakers, or Friends, from the operation of the act, as also Menonists. As to them the act gives no directions. From this, also, an inference is attempted to be drawn that lawful marriages of all other persons must be in the mode directed or allowed. We think the inference is not a necessary one. Both these sections, the fourteenth and fifteenth, are to be found in the acts of other states, in which it has been decided that the statutes do not make invalid common-law marriages.

It is unnecessary, however, to pursue this line of thought. If there has been a construction given to the statute by the Supreme Court of Michigan, that construction must, in this case, be controlling with us. And we think the meaning and effect of the statute

has been declared by that court in the case of *Hutchins v. Kimmell*, 31 Mich. 126, a case decided on the 13th of January, 1875. There, it is true, the direct question was, whether a marriage had been effected in a foreign country. But in considering it, the court found it necessary to declare what the law of the state was; and it was thus stated by Cooley, J.: "Had the supposed marriage taken place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, would have been evidence of a marriage, even though it had fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time live together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by the great weight of authority in favor of the rule as we have stated it;" citing a large number of authorities and concluding, "such being the law of this state." We cannot regard this as mere *obiter dicta*. It is rather an authoritative declaration of what is the law of the state, notwithstanding the statute regulating marriages. And if the law in 1875, it must have been the law in 1845, when, it is claimed, Mowry and the Indian girl were married; for it is not claimed that any change of the law was made between the time when the statute was enacted and 1875. The decision of the Michigan Supreme Court had not been made when this case was tried in the court below. Had it been, it would doubtless have been followed by the learned and careful circuit judge. But, accepting it as the law of Michigan, we are constrained to rule there was error in charging the jury, that, if they found neither a minister nor a magistrate was present at the alleged marriage, such marriage was invalid, and the verdict should be for the defendants.

It has been argued, however, that there was no evidence of any marriage good at common law, which could be submitted to the jury, and, therefore, that the error of the court could have done the plaintiff no harm. If all the evidence given or legally offered were before us, we might be of that opinion; but the record does not contain it all, and we are unable, therefore, to say the ruling of the court is immaterial. The case must, therefore, go back for a new

trial. We do not consider the other questions presented. They may not arise on the second trial.

Judgment reversed, and new trial ordered.

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MITCHELL, J., IN HULETT *v.* CAREY.

66 MINN. 327, 335. — 1896.

THE respondent had been for a long time prior to the execution of the marriage contract<sup>2</sup> in the employment of Hulett as housekeeper at his farm at Stoney Point some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged. Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although in *verba de presenti*, must be followed by habit or reputation of marriage — that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent

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<sup>1</sup> In *McLaughlin's Estate* (4 Wash. St. 570. — 1892), the Supreme Court of the State of Washington, in declaring common-law marriages invalid, reviews at length the decisions of various other jurisdictions upon the subject.

<sup>2</sup> The written contract is as follows: "January 6, 1892. Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful we do hereby agree to be husband and wife and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written. (Signed) N. Hulett, L. A. Pomeroy."



of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Com. p. 87; 2 Greenl. Ev. sec. 460; 1 Bish. Mar. & Div. secs. 218, 227-229. The maxim of the civil law was "*consensus non concubitus facit matrimonium*." The whole law of the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing to the law, although it may be evidence of marriage. It is mutual present consent, lawfully expressed, which makes the marriage. 1 Bish. Mar. Div. & Sep. secs. 239, 313, 315, 317.<sup>1</sup> See, also, the leading case of *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. *Dalrymple v. Dalrymple*, *supra*. The only two cases which we have found in which anything to the contrary is actually decided, are *Reg. v. Millis*, 10 Clark & F. 534, and *Jewell v. Jewell*, 1 How. 219; the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country. Counsel for appellants contend, however, that the law is otherwise in this state; *State v. Worthingham*, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, *per verba de presenti*, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents;" citing *Hutchins v. Kimmell*, 31 Mich. 126. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed *per verba de presenti* to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been consequently acted upon by their living together professedly as husband and wife. In some cases where

<sup>1</sup> *Contra*, that present consent is not sufficient, but there must also be cohabitation. *Lorimer v. Lorimer*, 124 Mich. 631.

such expressions were used the court was merely stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage. In *State v. Worthingham*, *supra*, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind was that this was competent evidence of a marriage, and that no formal solemnization of ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it. The case of *Hutchins v. Kimmell*, *supra*, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation;" but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife. *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345, and *Id.*, 79 Cal. 633, 22 Pac. 26, 131, is not in point, for the reason that section 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations." In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do.

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### DUNCAN *v.* DUNCAN.

10 OHIO ST. 181.—1859.

PETITION in error in the nature of a bill of review. Reserved in Cuyahoga county.

BRINCKERHOFF, C. J. This is a petition in error, in the nature of a bill in review, filed in the District Court of Cuyahoga county to reverse a decree of that court, and reserved for decision by this court.

The original case was a bill in chancery, filed in the Common Pleas of Cuyahoga county, by Eliza Duncan, now defendant in error, against Robert Duncan, now plaintiff in error, and others, alleging that she is the widow of Alexander Duncan, deceased; that said Alexander died seized of certain real estate described; and praying the assignment to her of dower therein. The case, having been determined in the Common Pleas, was taken, by appeal, to the District Court, which court decreed dower to Eliza, as prayed for in her bill. To reverse this decree, this petition is prosecuted.

The facts of the case, on which this decree was based, as clearly appear from the bill, answers, exhibits, and testimony, are substantially these:

Alexander Duncan, a native of Ireland, was married in that country. He abandoned his wife, came to this country, bringing with him two sons (of whom the plaintiff in error is one), the only offspring of such marriage, and settled at Cleveland, in this state. Soon afterward, the complainant below, Eliza, who had been brought up and lived in the same neighborhood with Alexander Duncan, in Ireland, and well knew both him and his wife, as well as the fact of his marriage, came over the water to Cleveland at his request, and began to cohabit with him as his wife, under an agreement or understanding that, as soon as he could procure a divorce from his wife left behind in the old country, he would marry her, Eliza. He introduced and spoke of her as his wife, and she passed among the neighbors as such. Two children were the result of this adulterous connection; for the wife in Ireland still lived, and no divorce was ever obtained. Finally, news arrived (and which seems to have been true), of the death of the old wife in a poor-house in Ireland. The promise that "he would marry her" was then renewed to Eliza; but no other marriage was ever celebrated, in any form, between them, and they continued to cohabit as before; and he, soon after, sickened and died.

The District Court having, on this state of facts, decreed dower to Eliza, the sole question made by this proceeding in review is, whether a contract to marry in the future, followed by cohabitation as husband and wife, is, *per se*, a marriage?

The proof of some of the most important of the facts above mentioned, rests mainly upon declarations made by Eliza, after the death of Alexander Duncan; and it is objected that evidence of this kind is unreliable and unsatisfactory. This is often, and perhaps ordinarily so; but it is not always, or necessarily so, nor is it so in this case. She had ample means of knowing as to the facts of which she spoke; she made the declarations deliberately and repeatedly,

under circumstances rebutting all suspicion of fraud or circumvention; and if they were otherwise, she had every apparent interest so to declare. The declarations of a party, made under such circumstances, often constitute the strongest and most satisfactory evidence.

We desire that it shall be distinctly noticed that this case presents no question as to the validity of a marriage contract (otherwise than in accordance with the provisions of our statute on that subject), *per verba de presenti*, as if, the parties being competent to contract the relation of marriage, the man shall say, in the presence of witnesses, "I hereby take you for my wife;" and the woman shall say, "I hereby take you for my husband." The facts of the case make no such question; and we leave it where we find it.

Nor is this a question as to the presumption of a marriage from reputation; or from circumstances, such as cohabitation, holding each other out as husband and wife, and the like. Such presumption, in the absence of evidence to rebut it, is often and properly made. But the question, as before stated, is simply this, whether a contract to marry *per verba de futuro*, followed by cohabitation as husband and wife, is in itself a marriage? For, in this case, the evidence of the fact is clear and explicit, and there is no room for presumption.

The idea that a contract for a future marriage, followed by cohabitation as husband and wife, is itself a valid marriage at common law, seems to have obtained currency on the credit of remarks made by several elementary writers of distinguished learning and ability, and by certain judges of high character, speaking by way of *obiter dicta*, in cases in which this question was really in no way involved. But the better opinion now seems to be, that these remarks are unsupported by any case actually adjudicated and entitled to be considered as authoritative; and that such a contract never was a good marriage at common law, either in this country or in England; and the mistaken doctrine seems to have originated, either in the inadvertent confounding of what might, in the absence of rebutting evidence, be good presumptive evidence of a marriage, with marriage itself; or from the fact that such a contract *per verba de futuro*, followed by cohabitation, was one of which the canon law, as administered by ecclesiastical courts in England, until restrained by statute, would enforce the specific performance.

Chancellor Kent, 2 Com. 87, says: "If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to valid marriage in the absence of all civil regulations to the contrary,



and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiæ*." In support of this proposition he cites no authority.

Mr. Greenleaf, in his work on Evidence, vol. 2, sec. 460, states the same doctrine in the same language, and cites Kent, Com. 87; *Fenton v. Reed*, 4 Johns. 52, and *Jackson v. Winne* 7 Wend. 47. Now, neither of these cases sustain the doctrine of his text. The former was a case simply where marriage was presumed, in the absence of evidence to the contrary, from circumstantial evidence, such as cohabitation, reputation, acknowledgment of the parties, etc.; and the latter case was one of marriage *per verba de presenti*.

The same doctrine of marriage *per verba de futuro* is recognized in the remarks of Chief Justice Boyle in *Demarsely v. Fishley*, 3 A. K. Marsh, 369, and in those of Cowen, J., in *Starr v. Peck*, 1 Hill, 270. But neither of those cases involved this question, and the remarks of those learned judges were, therefore, incidental, and outside of the cases under consideration before them.

Bouvier, in his institutes, vol. 1, p. 110, lays down the same doctrine as Kent and Greenleaf, in the same language, and cites Kent and Greenleaf, *ubi supra*, *Fenton v. Reed*, and *Jackson v. Winne*, before referred to, and also *Cram v. Burnham*, 5 Greenl. 213; *Hantz v. Sealy*, 6 Binn. 405; and Bac. Abr., Marriage, B.

*Cram v. Burnham* was a suit by Cram, upon a promissory note given to his pretended wife, with whom he was cohabiting as a wife, but, as the proof showed, really in a state of adultery. The court, in deciding the case, say, that if the proof had stopped with the proof of cohabitation, a marriage might have been presumed; but as the proof rebutted the presumption of marriage arising from the fact of cohabitation, the plaintiff could not recover in his own name, and have judgment against him. And in so far as the case has any bearing upon the question before us, its authority is against, rather than in favor of, the proposition which it was cited to sustain. *Hantz v. Sealy* is equally far from sustaining the doctrine in support of which it is cited, except as to the validity of a marriage by words of contract in the present tense. Marriage or not, was the issue of the case. The words proved, on the part of the man, were "I take you for my wife;" and the woman, being told that if she would say the same thing, the marriage would be complete, answered, "To be sure he is my husband, good enough." The court held that these were not words, on the part of the woman at least, of present contract, but had reference to the past, and did not constitute a marriage. The citation from Bacon's Abridgement is this: "A contract *in futuro*, as, I will marry you, etc., may be enforced in the spiritual court but

such contract either party may release; also, if either party marry another person, such second marriage dissolves the contract." This citation, so far from supporting the proposition of Bouvier, goes only to show the correctness of the distinction above mentioned, to wit, that such a contract is no marriage, but it is only a contract which might, at one time in England, have been enforced in the spiritual courts and for a breach of which the law now gives a remedy in damages.

Blackstone, 1 Comm. 439, says: "Any contract made *per verba de presenti*, or in words of the present tense, and in the case of cohabitation, *per verba de futuro*, also, between persons able to contract, was, before the late act, deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it in *facie ecclesiæ*." What these "many purposes" for which a marriage *per verba de futuro* was valid, were, does not very clearly appear; and, whatever they may have been, it seems now to be pretty well settled that they did not embrace a right to dower on the part of the wife, nor the right to administer on her estate or to her property, on the part of the husband, nor the legitimacy of offspring, nor the avoiding of a subsequent marriage pending the first. 2 Bright on Husband and Wife, 397. In *Fewell v. Fewell*, 17 Peters, 213, the Supreme Court of the United States was equally divided on this question; and the remarks of the court in *Patton v. Philadelphia and New Orleans*, 1 La. Ann. Rep. 98, are *obiter*.

We have been cited to no case, and we can find none, decided either in England or the United States, to which such a marriage as this is claimed to be has been held valid. On the other hand, the well considered case of *Cheney v. Arnold*, recently decided unanimously by the Court of Appeals of New York, 15 N. Y. (1 Smith), 345, is directly in point against it. That was an action for the recovery of real estate by a husband in right of his wife, who claimed as heir to her deceased father. She was the fruit of a cohabitation following a contract to marry *per verba de futuro*. It was a question of legitimacy only. The court, after a somewhat elaborate review of the whole subject, disapproved of the *dictum* of Cowen, J., in *Starr v. Peck*, before cited, and held such contract to be no marriage in fact or at common law.

*The Queen v. Millis*, 10 Clark & Finnelly, 534, was a case in the House of Lords, in error to the Court of Queen's Bench in Ireland. The case arose upon a prosecution against Millis for bigamy, he having been married in Ireland *per verba de presenti*, by a Presbyterian minister according to the form of that church, and, leaving the

first, married another woman in England, in the face of the church. The case turned upon the question, which was formally put by the House of Lords to the judges of Westminster Hall, for their opinion, whether the first marriage was valid as a marriage at common law. The judges, not having seats in the House of Lords, through C. J. Tindal, of the Common Pleas, gave a unanimous opinion against the validity of the first marriage. In this the law lords, Lyndhurst, Cottenham, and Abinger, concurred. Brougham, Campbell, and Denman, were the other way. C. J. Tindal, and the six law lords above named, all delivered elaborate opinions, indicating much care and antiquarian research; and judgment was given against the validity of the first marriage. But, while the opinion of the eminent jurists of the kingdom was thus nearly balanced as to the validity, at common law, of a marriage by words of present contract, and not in the face of the church, there seems to have been no difference of opinion among them as to the invalidity of a marriage *per verba de futuro*, though followed by cohabitation. All of them are careful to distinguish the case before them from such a case, and either tacitly or expressly to admit the invalidity of the latter. And all of them, except Lord Brougham, admit that a marriage not celebrated in the face of the church, whatever else it may have been good for, did not carry with it the incident of dower. And the state of the law, as now understood in England, may be summed up as we find it in Kerr's Blackstone, 458: "Any contract made *per verba de presenti*, or in words of the present tense, and in the case of cohabitation, *per verba de futuro*, also, between parties able to contract, was, before the statute of George II, so far a valid marriage, that the parties might be compelled in the spiritual courts to celebrate it in *facie ecclesiæ*. But these verbal contracts are now of no force to compel a future marriage; their only operation being to give the party who is willing to perform his promise a right of civil action against the one who refuses to do so."

Finding ourselves, then, compelled by no preponderating force of authority to the adoption of a doctrine so loose as that which would be necessary to sustain the marriage claimed to exist in this case, we are unwilling to do so. It seems to us that grave considerations of public policy forbid it; but it would be alien to the customs and ideas of our people, and would shock their sense of propriety and decency. That it would tend to weaken the public estimate of the sanctity of the marriage relation; to obscure the certainty of the rights of inheritance; would be opening a door to false pretenses of marriage, and to the imposition upon estates of supposititious heirs;

and would place honest, God-ordained matrimony and mere meretricious cohabitations too nearly on a level with each other.

We are of opinion that the decree of the District Court ought to be reversed, and the original bill dismissed.

Judgment accordingly.

### DURFEE, C. J., IN PECK *v.* PECK.

12 R. I. 488, 489.—1880.

WE ARE of opinion that a mere executory agreement to marry does not become consummated by copulation unless the parties so intend. It is indispensable to marriage, whether under the statute or at common law, that the parties consent to be husband and wife presently, and though cohabitation following an engagement is evidence of such consent, it is not conclusive, but only *prima facie* evidence of it, and as such open to rebuttal by counter proof. 1 Bishop on Marriage and Divorce, secs. 253, 254; *Forbes v. Countess of Strathmore*, Ferg. 113; *The Queen v. Millis*, 10 Cl. & Fin. 534, 782; *Robertson v. The State*, 42 Ala. 509; *Port v. Port*, 70 Ill. 484. See, also, *Cheney v. Arnold*, 15 N. Y. 345; *Duncan v. Duncan*, 10 Ohio St. 181, and Mr. Bishop's criticisms on them in 1 Bishop on Marriage and Divorce, secs. 255-258. In the case at bar, we think the evidence shows that the parties after their engagement were all along looking forward to a formal ceremony to make them husband and wife, and never agreed or consented to become such without it.<sup>1</sup>

<sup>1</sup>“Confessions and cohabitation would be competent evidence alone of a marriage in most civil actions. It is competent as evidence in all, but not sufficient in prosecutions for bigamy, actions for criminal conversation and other cases, in which a marriage in fact must be proved.”—ALLEN, J., in *Hayes v. People*, 25 N. Y. 390, 396. “The reason is that while ordinarily such evidence is sufficient because the law places that interpretation upon ambiguous acts which favors innocence, and will not assume that cohabitation is illicit if, by presuming marriage, it would be lawful, yet in a prosecution for adultery this presumption conflicts with the presumed innocence of the prisoner of the crime of which he is charged, and, therefore, such evidence in such cases cannot alone establish a marriage. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proof alone.”—IRVINE, C., in *Bailey v. State*, 36 Neb. 808, 812.



*Non-age of a Party.*KOONCE *v.* WALLACE.

7 JONES LAW (N. C.), 194.—1859.

THIS was a motion to grant letters of administration on the estate of James G. Wallace, deceased, made before the Supreme Court of Onslow, at its last spring session, Shepherd, J., presiding.

The facts of the case are as follows: In February, 1858, James G. Wallace, being then under twenty-one years of age, but over sixteen, was married to Caroline Tilghman, then under fourteen years. She became fourteen in June, 1858, and lived with Wallace as his wife, until September 23d, 1858, when he died, being still under twenty-one. The parties lived together as man and wife, and strictly recognized each other as such, from the marriage in February, 1858, until the death of the husband in September of the same year. At December Term of Onslow County Court, Caroline Wallace, widow of James Wallace, applied for letters of administration on his estate, when the defendant in this case, the mother of the intestate, and also his highest creditor, opposed the motion, alleging that no marriage had taken place between her son and the applicant, inasmuch as the applicant was under fourteen years of age when married. The County Court granted the letters of administration to the applicant, and from this judgment there was an appeal to the Superior Court, when the applicant, Caroline, relinquished to Francis D. Koonce, her right to administer, and that court accordingly granted him letters of administration; and from this judgment defendant appeals to this court.

PEARSON, C. J. It is enacted, Rev. Code, c. 69, sec. 14, "Females under the age of fourteen, and males under the age of sixteen years, shall be incapable of contracting marriage."

A marriage is duly solemnized in all respects save that the female is a few months under the age of fourteen; the parties lived together as man and wife, until she arrives at that age, and afterwards continue so to live together until the death of the other party.

The question is upon the construction of this statute, was the marriage void, *i. e.*, a mere nullity, or was it voidable, *i. e.*, imperfect, but capable of being confirmed and made perfect by subsequent consent and cohabitation as man and wife?

At common law, fourteen in males and twelve in females was the age of consent, and if one or both of the parties, at the date of the celebration of the marriage, were under the requisite age, such mar-

riage was imperfect, by reason of the fact that the parties were incapable of contracting marriage, but it became perfect and was confirmed if the parties, after attaining the requisite age, assented to it by continuing to cohabit together as man and wife. In other words, the marriage was not void, but was only imperfect or voidable for the want of capacity, but could be made perfect or be confirmed by the consent of the parties, implied from subsequent cohabitation as man and wife; on the same principle by which it was held that the contract of one under the age of twenty-one, in respect to property, except for necessities, and although imperfect and voidable because of a supposed want of capacity, may be confirmed and made perfect by assent, after attaining the age of twenty-one. Indeed, the application of this principle, is especially called for in regard to the contract of marriage from its peculiar nature and consequences. *Coke Lit.* 33a; *ibid*, 79a; *Note* 43; 1 *Bl. Com.* 436. Such was the settled rule of law in regard to incapacity to contract, for the want of age, previous to the statutory enactment above recited; and in the opinion of this court, the only effect of the statute, was to make sixteen instead of fourteen years in respect to males, and fourteen instead of twelve years in respect to females, the ages at which the parties, respectively, were capable of making a perfect marriage, leaving the rule of the common law unaltered in all other respects; for, as is said by Bishop in his treatise on "Marriage and Divorce," sec. 192: "The common-law rule of fourteen in males and twelve in females, as the age of consent, was derived from the civil and canon law. It originated in the warm climate of Italy, and it has been thought not entirely suited to more northern latitudes. In some of the United States it has been altered by statute, and the age of consent fixed at later periods of life."

This construction of the statute is supported by "the reason of the thing," for no ground of public policy can be conceived of making it expedient to deprive the parties of the common-law right to confirm by subsequent consent and cohabitation as man and wife, a marriage solemnized in due form of law, although imperfect, because both or one of the parties were incapable, for want of age, of making a perfect marriage, whereby, notwithstanding such confirmation by assent and cohabitation, they should be subjected to indictment for living together in fornication, and their issue should be deemed bastards. And, as we conceive, the correctness of this construction is put beyond the reach of doubt or question, by a comparison with other sections of the same statute, to wit,—section 9, "all marriages contracted after," etc., "between persons nearer of kin than first cousins, shall be void;" section 7 — "all marriages since," etc.,

"between a white person and a free negro, or free person of color to the third generation, shall be void," sec. 8.—"No minister of the gospel or justice of the peace shall marry a white person with an Indian, negro or free person of color to the third generation, knowing them to be so, upon pain of forfeiting," etc. Thus in the statute, some marriages are made void, and, in respect to others, it is enacted, that the parties shall be incapable of contracting marriages. Why this change of expression, if the same idea was intended to be expressed? Taking into consideration the law as it was before settled, there is no rule of construction which would justify the court in giving the same meaning and effect to modes of expression so different, and such a construction would shock common sense.

On the argument, *Gathings v. Williams*, 5 Ired. Rep. 487, was cited, and the counsel relied on this passage in the opinion "Where the marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is a want of age or understanding, or a prior marriage still subsisting, the marriage is void absolutely, and from the beginning." In that case there was a prior marriage still subsisting, and the point presented was the effect of a second marriage, so what dropped from the court in regard to a want of age or understanding was an *obiter dictum*. There is a marked distinction. It may well be, that a second marriage, while the first is still subsisting, is void and incapable of confirmation, because it is so utterly denounced by the law, as to subject the party marrying a second time, to capital punishment as a felon, but a mere want of age or understanding rests on a different footing entirely. *Crumph v. Morgan*, 3 Ired. Eq. 91, was also cited. That was a case where the marriage was duly solemnized but the woman was a lunatic at the time, and at no time afterwards was in the possession of her faculties, "so as to be capable of judging of her rights or interests or of making or confirming a contract." So the very learned disquisition on the question, whether if she had been restored to sound mind, the marriage of such an one as could have been confirmed by her subsequent assent and cohabitation, was extra judicial, and in regard to it "the doctors differ," for Bishop in his learned treatise, secs. 188, 189, 190, inclines to the opinion in his comments on that case, that such a marriage could be confirmed, and calls attention to the fact that the passage in "Poynter on Marriage," relied on in *Crumph v. Morgan*, was misapprehended, for the author had reference to marriages void for the want of due solemnity, as where the party officiating was not a minister of the gospel, or where there was the impediment of a former pre-existing marriage, and he establishes by the authority

cited, secs. 122 and 123, that marriages under fraud, terror or duress, though generally spoken of in the books as void, are in effect, only voidable, and may be confirmed by subsequent consent and voluntary cohabitation as man and wife. However this may be, we think it clear, that the statute under consideration, does not abrogate the principle of the common law in respect to marriages where both of the parties, or one of them, are under the age of consent; and, although the marriage is imperfect for the want of capacity, it may be confirmed, and the effect of the statute is only to change the age of consent so as to make it conform to our more northern latitude. There is no error.

*Per Curiam.* Judgment affirmed.

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MUNSON, J., IN FISHER *v.* BERNARD.

65 VT. 664, 666.—1893.

The petitioner seeks an annulment of the marriage of his daughter, contracted when she was thirteen years of age, on the ground that she was then within the period of disability. R. L. 2,349 provides for the annulment of a marriage when either party had not, at the time of the marriage, attained "the age of legal consent." By No. 63, Acts of 1886, the age under which a female person was held incapable of consenting to unlawful carnal knowledge was raised to fourteen years, and the petitioner contends that this alteration effects an extension of the period within which a female child is disabled from contracting marriage.

From 1791 to 1886 the age of consent as regards unlawful carnal knowledge was fixed by statute at eleven years. At common law males under fourteen and females under twelve were incapable of contracting a binding marriage. \* \* \* It may be true that the phrase "age of legal consent" is sometimes applied to age of consent established by the statute relating to unlawful carnal knowledge; but we find nothing to indicate that the Legislature used it with reference to that limit in providing for a sentence of nullity, or supposed that in raising the age of consent by the act of 1886 it was effecting a like change in the age of capacity to contract marriage. There is certainly no difficulty in believing that the Legislature intended by the latter statute to guard a female child from unlawful carnal knowledge for a time after she was capable of contracting a binding marriage. We hold that the period of disability to contract marriage is that of the common law.



## STATE EX REL. SCOTT v. LOWELL ET AL.

78 MINN. 166. — 1899.

APPLICATION by the state, on the relation of Alex. W. Scott, in behalf of Sadie Scott, for a writ of *habeas corpus* against Fred L. Lowell and Phil T. Megaarden. Judgment for respondents. On a trial *de novo*, judgment entered for relator.

START, C. J. On October 18, 1899, the relator, Alexander W. Scott, a man 32 years of age, and Sadie Lowell, a girl then only 13 years and 11 months old, the daughter of the respondent Fred L. Lowell, were married, without the consent of her parents, in due form, by an ordained minister of the gospel, upon the presentation of a license in due form, issued by the clerk of the proper county. Cohabitation as husband and wife followed the marriage, but on the next day thereafter the father went to the house of the husband and forcibly took his daughter away, against her will and wishes, and detained her. Thereupon a writ of *habeas corpus* in her behalf was sued out of the District Court for the county of Hennepin, on the relation of her husband. Upon a hearing on the return of the writ the court discharged the writ, and remanded the wife to the custody and control of her father, from which order the relator appealed to this court. The cause was here heard *de novo*, pursuant to Laws 1895, c. 327. A referee was appointed to take and report the evidence, who did so. The evidence establishes the facts we have already stated, and, further, that the husband is an industrious man, who has a home, and is able to support a wife and family, and that his wife is ready and anxious to return to and live with him as her husband, if relieved from the restraint of her father. The wisdom of this marriage, or the propriety of the relator's conduct in inducing this young girl to marry him, are questions which it is not our province to discuss or characterize. Moralize as we may, the fact remains that the parties were married, and the marriage has been consummated; hence we are now simply to inquire dispassionately as to the legal status of the parties. The question presented by the record is, was this marriage void or voidable, and, if the latter, did it emancipate the wife from the custody of her father.

The common law established the age of consent to the marriage contract at 14 years for males and 12 years for females, but our statute (Gen. St. 1894, § 4769) provides "that every male person who has attained the full age of eighteen years and every female who has attained the full age of fifteen years, is capable in law of contracting

marriage if otherwise competent." But the statute does not declare that, if a marriage is entered into when one or both of the parties are under the age limit prescribed, the marriage shall be void. It does, however, impose restrictions and penalties upon public officers and clergymen, for the purpose of preventing, so far as possible, such marriages being solemnized; but the statute has, for wise reasons, stopped short of declaring such marriages void. Such being the case, we hold, upon principle and authority, that the marriage of a person who has not reached the age of competency as established by the statute, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterwards, if the parties have not voluntarily cohabited as husband and wife after reaching the age of consent. Gen. St. 1894, §§ 4769, 4786, 4788, 4789; Schouler Dom. Rel., § 20; 14 Am. & Eng. Enc. Law, 488; 1 Bish. Mar. & Div., § 145; *Beggs v. State*, 55 Ala. 108; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806; *State v. Cone*, 86 Wis. 498, 57 N. W. 50. The marriage being voidable, it must be treated as valid for all civil purposes until annulled by judicial decree. Schouler, Dom. Rel., § 14.

Now, the question of the right of the respondent, as father of the relator's wife, to restrain her from going to her husband, must be determined upon the basis that the marriage is valid. The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. 1 Bish. Mar. & Div., § 275; Schouler Dom. Rel., § 267. The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband cannot enforce his marital rights without the consent of the wife, and that she cannot, by giving her consent to a voidable marriage, free herself from parental control, and, further, that she cannot do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under 12 and over 7 years of age to emancipate herself by consenting to a voidable marriage. This course of reasoning ignores the fact that the marriage, until set aside, must be, for all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife — and this girl must be regarded as such for the purposes of this case — certainly has the capacity to consent to live with her husband. Whether the marriage of a child under 12 years of age and over 7

years would emancipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control. Our conclusion is that the respondent is not legally entitled to detain his daughter, if she elects to return and live with her husband. Therefore it is ordered that Sadie Scott, the wife of the relator, Alex. W. Scott, be freed from the restraint of her father, the respondent Fred L. Lowell, and that he surrender her to the relator, if she elects to live with him as her husband. Let judgment be so entered.

*Mental Incapacity of a Party.*

POWELL v. POWELL.

18 KAN. 371.—1877.

ERROR from Neosho District Court.

HORTON, C. J. An action was commenced in January, 1875, in the District Court of Neosho county, by Margaret Powell to obtain a divorce from James L. Powell. The causes alleged in the petition were the impotency of the defendant, and extreme cruelty on his part toward the plaintiff. The petition also stated that the defendant was at the time of the marriage, and at the time that the plaintiff contracted to marry the defendant, afflicted with insanity, which then and long after the marriage was wholly unknown to the plaintiff; that the defendant had continued insane from the time of the marriage to the commencement of the action, and that his insanity had continually grown worse; that on or about June 11th, 1872, he was committed to the insane asylum at Osawatomie, and had since that time been confined in the asylum. Service of the summons was made on the guardian of the defendant in pursuance of sec. 36 of chapter 60, Gen. Stat. 557. No answer was filed, and no proof offered, the court entered a decree of divorce releasing the parties from the obligations of the marriage, giving the custody of the children born in wedlock to the plaintiff, and adjudging that the plaintiff should have, enjoy, and possess as alimony, certain real estate with the right to sell the same at her pleasure. Eleven months afterwards, a motion was made by James L. Powell, by his counsel, John C. Carpenter, Esq., to vacate and set aside the judgment, as wholly void, because the petition did not state facts sufficient to constitute a cause of action. On 29th December, 1875, the court sustained the motion, and ordered an entry to be made that the judgment should be set aside as void, and held for naught. To this action of the court the plaintiff excepted and asks that it be reversed.

Under the allegations in the petition, we must assume that the defendant was insane at the time of the alleged acts of cruelty, and, as a sequence, was mentally incapable of knowing what he did. Under such circumstances, on very familiar principles, he could not be held responsible for his acts, and we do not think the acts thus committed a sufficient cause for divorce. As insanity itself, after marriage, is no cause for a divorce, nothing which is a consequence of it can be. The counsel for plaintiff do not dispute this con-



clusion, but insist that the petition should be so construed that the defendant had lucid intervals, and that thereupon, proof was introduced that the defendant was sane at the commission of the acts complained of. Unfortunately for this theory, there is no room for this construction. The allegations in the petitions are broad and sweeping. It is asserted "that the defendant was at the time of the marriage, and has continued to be and still remains insane, and that his insanity has continually grown worse." The extreme cruelty alleged, occurred June 1st, 1872, and ten days afterward the defendant was taken to the insane asylum. If the defendant had lucid intervals, and committed any act for which he was responsible during such time, upon which a decree of divorce could be based, the petition should have so stated. In the absence of any such allegation, we cannot presume, against the averment to the contrary, that the defendant was sane at the commission of the alleged acts of cruelty. The petition excludes the idea.

Counsel for plaintiff admit that the statements concerning impotency set forth in the petition are insufficient, and should be treated as surplusage; hence, we need only say, as to that alleged cause for divorce, that our statute in that regard is to be interpreted in harmony with the common law; and when the Legislature enacted that a divorce might be granted for impotency, it was intended that the impotence must have existed at the time of the marriage. If a person should become impotent after marriage, the marriage is good, and no ground of divorce exists therefor. Such is the universal doctrine.

The only serious question in this case is, the effect of the averments of the insanity of the defendant at the time plaintiff contracted to marry him, his insanity at the date of such marriage, and the continuance of such insanity. The marriage of an insane person is absolutely void, by reason of the want of capacity of such a party to contract; and in this case, if the allegations in the petition are true, the marriage of the plaintiff and defendant was null and void, and has never since obtained any validity, because the defendant has never been in any mental condition to ratify or consummate it. Not only was there no marriage *de jure*, but it would also be a misnomer to call it a marriage *de facto*, although law writers thus frequently designate it. It was a nullity, and the plaintiff is in no way bound to defendant by any marriage relation. The concurring assent of the two minds was wanting. The plaintiff is as free from the defendant as if the court below had pronounced the decree of nullity, as no judgment was necessary to restore the parties to their original rights. The fitness and pro-

priety of a judicial decision pronouncing the nullity of such marriage, is supported, because conducive to good order and decorum, and to the peace and conscience of the party seeking it. *Weightman v. Weightman*, 4 Johns. Ch. 343; *Rawdon v. Rawdon*, 28 Ala. 565. Another reason why a judicial determination of such a marriage ought to be sanctioned, is, that an opportunity should be given, when the evidence is obtainable, and the parties living, to have the proof of such marriage being void preserved in the form of a judicial record, so that it cannot be disputed or denied. But in the case at bar, the cause was prosecuted, tried, and decided, as a "divorce suit" under the provisions of the code. This is more apparent when we fully examine the record. Permission was obtained to amend the petition, and two statutory causes for which divorces are granted were inserted; the maiden name of the plaintiff was omitted; the petition was verified; the children's names were set forth, with the surname of the defendant; the real estate of the defendant was specifically described, and in the prayer for relief the court was asked to grant a divorce, to divide the real estate, to give \$3,000 as alimony, and to award the custody of the children to plaintiff. The court, in rendering judgment, granted all the relief prayed for, but instead of dividing the real estate, decreed all of it as alimony to the plaintiff who had assumed and retained the name of the defendant. Under the particular circumstances of this case, we cannot construe the action as one prosecuted to have a void marriage pronounced a nullity, and that therefore the action of the court below, in vacating and setting aside the judgment for being void, was not erroneous.

It is immaterial whether the defendant, or his attorney, had the right to appear and make such motion or not. If the judgment was void, no injury resulted to the plaintiff from the order of the court; and holding the judgment void, we cannot interfere with the action of the District Court. If the judgment in this case could be construed as a decree annulling a void marriage, so much of the judgment as awards alimony to the plaintiff would be nugatory. We view the case as the court below considered it, and treat it as that court treated it, simply as an action for divorce and alimony, under the provisions of the code. Any other construction by us would be grossly unjust to all the parties to the proceeding, and especially so to the plaintiff. It is doubtful whether the plaintiff would be willing to accept the original judgment attempted to be rendered, if she was fully acquainted with the consequences which would result if we were to hold the judgment valid so far as determining the marriage void *ab initio* by reason of the insanity of the defendant. A sentence

of nullity like this would strip her of all alimony, deprive her of all interest in the property of defendant, and bastardize her children. We make these last remarks more freely, because the counsel for the plaintiff in this court state in their brief "that they first became connected with the case after the filing of a motion to vacate the judgment, and hence are not responsible for the pleadings."

If, upon full consideration, the plaintiff still wishes to end the mesalliance between herself and the defendant by a sentence of nullity declaring void the marriage for want of sufficient mental capacity of the defendant, with consent of the court below, she can amend her petition, and prosecute the suit to final judgment, or she may disregard the proceedings had and commence *de novo*. Sec. 648 of the Code (Gen. Stat. p. 759), does not in any manner restrict the plaintiff from prosecuting or instituting her action to annul a void marriage. Said section applies only to incapables, who are unable to contract marriage from want of age or understanding. Independently of the provisions relating to divorce, the District Court has full jurisdiction to afford the plaintiff requisite relief. If she wishes no judicial determination of the question, and the defendant was insane at the time of the marriage, and has had no lucid intervals since, she may treat such marriage as wholly void. So it is not correct, as the counsel for plaintiff suggest in their brief, that if this judgment is not upheld the unfortunate plaintiff has no relief.

The order of the District Court in vacating the said judgment will be affirmed.

All the judges concurring.

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LEWIS *v.* LEWIS.

44 MINN. 124.—1890.

APPEAL by plaintiff from a judgment of the District Court for Hennepin county, where the action (brought to annul the marriage of the parties) was tried by Lochren, J.

VANDERBURGH, J. The statute in relation to divorces (Gen. Stat. 1878, c. 62, sec. 2), provides that "when either of the parties \* \* \* for want of age or understanding, is incapable of assenting thereto, \* \* \* the marriage shall be void from the time its nullity is declared by a court of competent authority." Certain limitations are imposed by secs. 4 and 5, as follows: "Nor shall the marriage of any insane person be adjudged void after his restoration to reason if it appears that the parties freely cohabited together as

Husband and wife after such insane person was restored to a sound mind." "Sec. 5. No marriage shall be adjudged a nullity at the suit of a party capable of contracting, on the ground that the other party was \* \* \* insane, if such \* \* \* insanity was known to the party capable of contracting, at the time of such marriage." There are no other provisions on the subject of insanity, and no form of insanity or insane delusion is included in the list of causes for divorce; and insanity arising subsequent to the marriage affords no ground for divorce. The section first quoted is simply declaratory of the common law. There must have been, at the time of the marriage, such want of understanding as to render the party incapable of assenting to the contract of marriage. The plaintiff applies for a decree of nullity on the ground of his wife's insanity at the time of his marriage, of which he claims to have then had no knowledge. The particular form of insanity alleged was a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania." It was not proved, nor is it found by the court, that she was not otherwise sane, or that her mind was so affected by this peculiar propensity as to be incapable of understanding or assenting to the marriage contract. Whether the subjection of the will to some vice or uncontrollable impulse, appetite, passion, or propensity be attributed to disease, and be considered a species of insanity, or not, yet as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligation of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the contract. Any other rule would open the door to great abuses. *Anon.*, 4 Pick. 32; *St. George v. Biddeford*, 76 Me. 593; *Durham v. Durham*, 10 Prob. Div. 80. For a discussion upon the characteristics of the peculiar infirmity to which the defendant here is alleged to be subject, see 1 Whart. & S. Med. Jur. (4th ed.), secs. 591, 595. The cases are numerous in which contracts and wills have been upheld by the courts, though the party executing the same is subject to some peculiar form of insanity, so called, or is laboring under certain insane delusions. *In re Blakey's Will*, 48 Wis. 294 (4 N. W. Rep. 337); *Fenkins v. Morris*, 14 Ch. D. 674; 11 Am. & Eng. Enc. Law, 111, and cases.

The defendant is found to have been subject to this infirmity at the time of her marriage with plaintiff, in 1882, but it was concealed and kept secret from the plaintiff by her and her relatives, and was not discovered by him until 1888. As before suggested, if it had developed after the marriage, the plaintiff would not have been entitled to judicial relief, though the consequences might have been



equally serious to him. But the plaintiff contends that such concealment constituted a case of fraud, such that the court should declare the contract of marriage void on that ground. Where one is induced, by deception or stratagem, to marry a person who is under legal disability, physical or mental, the fraud is an additional reason why the unlawful contract should be annulled. And so deception as to the identity of a person, artful practices and devices used to entrap young, inexperienced, or feeble-minded persons into the marriage contract, especially when employed or resorted to by those occupying confidential relations to them, and where the contract is not subsequently ratified, are proper cases for consideration of the court. But, generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general. *Reynolds v. Reynolds*, 3 Allen, 605; *Leavitt v. Leavitt*, 13 Mich. 452; 1 Cooley Bl. 439, and notes. The facts found do not present a case warranting the relief asked.

Judgment affirmed.

### *Physical Incapacity of a Party.<sup>1</sup>*

POWELL *v.* POWELL.

18 KAN. 371.—1877.

[Reported herein at p. 44.]

### *Consanguinity of Parties.*

SUTTON *v.* WARREN.

10 MET. (MASS.) 451.—1845.

ASSUMPSIT on a promissory note for \$1,300, given by the defendant to Ann Sutton, on the 10th of August, 1840. The case was submitted to the court upon the following facts agreed on by the parties:

The note declared on was given for money lent by Ann Sutton to the defendant. The plaintiff and said Ann Sutton are natives of England, and were married at Duffield, in England, on the 28th of

<sup>1</sup> See also, *G— v. G—*, 33 Md. 401; *Wendel v. Wendel*, 30 App. Div. (N. Y.) 447.

[DOMESTIC RELATIONS — 4.]

November, 1834. About one year after their marriage, they came to this country, where they have lived, as husband and wife, ever since. The said Ann was the own sister of the mother of the said Samuel Sutton, the plaintiff, and has always since said marriage gone by the name of Ann Sutton. Her former name was Ann Hills.

HUBBARD, J. It is a well settled principle in our law, that marriages celebrated in other States or countries, if valid by the law of the country where they are celebrated, are of binding obligation within this Commonwealth, although the same might, by force of our laws, be held invalid, if contracted here. This principle has been adopted, as best calculated to protect the highest welfare, of the community in the preservation of the purity and happiness of the most important domestic relations in life. *Greenwood v. Curtis*, 6 Mass. 378; *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Compton v. Bearcroft*, Bul. N. P. 114; *Scrimshire v. Scrimshire*, and *Middleton v. Fanverin*, 2 Haggard, 395, 437. There is an exception, however, to this principle, in those cases where the marriage is considered as incestuous by the law of Christianity, and as against natural law. And these exceptions relate to marriages in the direct lineal line of consanguinity, and to those contracted between brothers and sisters; and the exceptions rest on the ground, that such marriages are against the laws of God, are immoral, and destructive of the purity and happiness of domestic life. But I am not aware that these exceptions, by any general consent among writers upon natural law, have been extended further, or embraced other cases prohibited by the Levitical law. This subject has been carefully discussed by Chancellor Kent, in the case of *Wightman v. Wightman*, 4 Johns. Ch. 343; and while he is clear as to the exceptions before stated, he thinks, beyond them there is a diversity of opinion among commentators. 2 Kent Com. Lect. 26. See also Story's Conflict of Laws, secs. 113, 114. There is also a provision in our statute, making marriages void in this State, where persons resident in the State, whose marriage, if solemnized here, would be void, in order to evade our law, and with the intention of returning to reside here again, go into another State or country and there have their marriage solemnized. Rev. Sts. ch. 75, sec. 6. The only object of this provision is, as stated by the commissioners in their report, to enforce the observance of our own laws upon our own citizens, and not to suffer them to violate regulations founded in a just regard to good morals and sound policy. As to the wisdom of this provision it is unnecessary here to speak. But the provision is notice to show that it has not been overlooked in the consideration of the case at bar, which presents no such state of facts.

In view of the whole matter, considering it as a part of the *jus gentium*, we do not feel called upon to extend the exceptions further. By our statutes, the marriage contracted between Samuel Sutton, the plaintiff, and Ann Hills, his mother's sister, if celebrated in this State, would have been absolutely void. But by the law of England, this marriage, at the time it was contracted, viz., in November, 1834, was voidable only, and could not be avoided until a sentence of nullity could be obtained in the spiritual court, in a suit instituted for that purpose. See Poynter on Marriage and Divorce, 86, 120; 2 Stephen's Com. 280. In *The Queen v. Inhabitants of Wye*, 7 Adolph. & Ellis, 771, and 3 Nev. & P. 13, the Court of Kings Bench affirmed the doctrine, and held such a marriage voidable only, and that, till avoided, it was valid for all civil purposes. Rosc. Crim. Ev. (2d ed.), 286. Since this marriage was contracted, the St. of 6 Wm. 4, c. 54, has been passed, making such marriages which should afterwards be celebrated, absolutely void. In the present case, the marriage of these parties was not void by the laws of England, though voidable in the spiritual courts. It never was avoided, and though absolutely prohibited by our laws, yet not being within the exception, as against natural law, we do not feel warranted in saying the parties are not husband and wife. The plaintiff, Samuel Sutton, sues on a promissory note given to the said Ann Sutton, and, as her husband, he can maintain an action thereon, in his own name alone, there being no other cause of objection raised than the one stated in regard to the legality of their marriage. Bayley on Bills (2d Amer. ed.), 42; Clancy, Husb. and Wife, 4.

Judgment for the plaintiff

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### *Prior Marriage of a Party.*

COLLINS *v.* VOORHEES.

47 N. J. EQ. 315.—1890.

ON appeal from a decree advised by Vice-Chancellor Van Fleet.

GARRISON, J., dissenting. The attitude of dissenting from the otherwise unanimous opinion of the court, upon so grave a subject as the law of marriage, is so distasteful that I have expended far more effort in endeavoring to concur than I have in the formulation of these views, which, after all, I find myself constrained to hold.

The question to be determined upon this appeal is the legitimacy of the children of Abraham and Caroline Voorhees, and that, in

turn, depends upon whether the relation of marriage existed between their parents.

The claim of these appellants is, that their father and mother were publicly married, and that they afterwards lived together as husband and wife, and were universally and always so reputed. The respondent, on the contrary, asserts that the ceremonial marriage was void, and that, therefore, no presumption of marriage can be drawn from the subsequent matrimonial conduct and reputation of the parties thereto. The Court of Chancery adopted this latter view, and declared against the legitimacy of the appellants.

The facts are not in dispute. Abraham Voorhees was married to a wife in New Jersey, and had by her one child, a son. After a time Voorhees separated from his wife, taking up his residence in the city of New York, while she remained in this state. Shortly after this separation, Voorhees brought a suit against his wife for divorce in the Superior Court of Connecticut. Notice of the pendency of this suit was mailed to the defendant, addressed to the husband's residence in New York, and, consequently, she did not receive it. A month later a decree of divorce was pronounced. Within a short time Voorhees proposed marriage to a lady who resided in West Newton, Massachusetts, to whom, as evidence of his capacity to contract a lawful marriage, he produced a certified copy of the record of the decree rendered in the court of Connecticut. A marriage was thereupon consented to, and was solemnized by a public church wedding in the presence of a large congregation of the friends and acquaintances of the parties. Two months later the divorced wife learned, for the first time, of the Connecticut suit, and thereupon made an application to that court which resulted in the opening of the decree of divorce, the filing of a cross bill against her husband, the annulling of the first decree and the granting of an absolute divorce to the wife upon her cross suit. Of these proceedings Caroline, who was residing with Voorhees in West Newton, was kept in entire ignorance, and down to the time of his death, which occurred some years later, was openly and unequivocally acknowledged and reputed to be his wife. Two children were the result of this union, both born after the second decree of divorce. Abraham Voorhees died in 1882. The father of Abraham was John F. Voorhees. He, by his last will, had given his residuary estate equally to all his children, the children of the deceased child to take the parent's share. The present contest has arisen upon the filing of a bill in the Court of Chancery of New Jersey by the son of Abraham by his first marriage, the prayer of which is, that that portion of the grandfather's estate which would have come to the said Abraham



Voorhees, if living, be paid over to the complainant as the only lawful child of the said Abraham.

From this statement it is evident that the sole question is whether, upon the facts stated, the law raises, in favor of the legitimacy of the appellants, a presumption of marriage between Caroline and Abraham from and after the time when he became capable of lawfully contracting marriage. The Court of Chancery answered this question in the negative. That decision this court now affirms, for the reason given by the court below.

The principle of law propounded by the learned judge who heard the case is, that "where actual marriage is shown, whether legal or illegal, the subsequent cohabitation of the parties and their reputation as husband and wife must necessarily be understood as having had their origin in such marriage, and cannot be treated as presumptive evidence of a second marriage at a later date."

The clearness of the language here employed, and the line of reasoning pursued permits no doubt as to the precise meaning and force ascribed to presumptions of marriage. The reasoning is this: Marriage may be entered into by mutual consent — that consent will be presumed from conduct and repute in cases where actual consent has not been shown — where an actual contract is shown the parties cannot in fact be supposed to have consented a second time, hence their conduct gives rise to no presumption of marriage. In fine, there can be no presumption of marriage where consent is not a logical inference from the facts proved; and where matrimonial cohabitation commenced by consent it is illogical to refer its continuance to a subsequent consent.

The fallacy of this argument is, that it assumes that the rule by which the law, from matrimonial conduct, presumes matrimonial consent, is a canon of evidence having for its object the ascertainment of whether in point of fact consent was interchanged, and, if so, at what period of time; whereas, it is easily demonstrable that the doctrine in question is founded on public policy and is uniformly applied upon principles other than those which regulate the laws of proof or prescribe the form of the syllogism.

The narrow rule promulgated by the court appears to me to be subversive of this important principle of public law, and to be out of harmony with the entire weight of authority upon this subject.

A somewhat similar view of the law was, it is true, at one time supposed to receive support from the cases of *Cunningham v. Cunningham*, decided in Lord Eldon's time, and *Lapsley v. Grierson*, which was before Lord Cottenham in 1848. The proposition, which these cases were thought to hold was, that if parties, either because of

legal impediments or from mere wantonness, entered upon a course of illicit cohabitation, their subsequent matrimonial conduct, with its resulting reputation, would, as matter of law, be so colored by its original meretriciousness that no matrimonial consent could be presumed. In 1867 the case of *Campbell v. Campbell* was before the House of Lords upon this precise point, and it was the opinion of every judge that the doctrine above stated received no support whatsoever from either of the cases cited or from any case, while the doctrine itself was distinctly and emphatically repudiated. This case (*Campbell v. Campbell*), often spoken of as "The Breadalbane Case," has, since its decision, been universally accepted as the leading authority upon the doctrine of the presumption of marriage. The facts of the case are these: James Campbell had eloped with a young wife of a middle-aged grocer named Ludlow. They fled to Canada, where they lived in connubial constancy and repute until after the death of Ludlow, of which, however, there was no proof that either of them ever heard. They returned to England, and, after the birth of a son, settled in Scotland, where they passed themselves off uniformly, unequivocally and constantly as man and wife. The case came before the courts, and ultimately before the House of Lords, upon the claim of the grandson to the estates of Breadalbane in the right of his father. The claimant's father was born in England after the return of his parents from Canada, and after the death of Ludlow, the first husband of his mother. The case turned, therefore, upon the question of the legitimacy of the claimant's father, and that depended upon whether his parents were lawfully intermarried. The chief contention pressed, as matter of law, against the presumption of marriage was, that the original coming together of the parties having been meretricious, their subsequent conduct must be referred to that illicit relationship, and could not, in law, raise the presumption that the parties had contracted a subsequent marriage. In his opinion to the House of Lords upon this point, Lord Westbury said: "The appellant objects that the cohabitation, which began when the parties were incapable of contracting marriage, and which was continued without change, is ineffectual to form the basis of the conclusion that consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded; but I am unable to find any principle to justify the introduction of such a rule, and what is more material to the purpose, I am unable to find any case or any book of authority in which that principle has been either followed out into a decision or has been laid down as a rule of Scotch law. It appears to be almost entirely derived by the

appellant from what I conceive to be a misapprehension of certain words found in the judgments delivered in *Cunningham v. Cunningham* and *Lapsley v. Grierson*, or rather (if I may venture to say so), from misapprehension of part of a marginal note to one of those cases. There is nothing (in those cases) to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. There is no foundation for the argument, that the matrimonial consent must, of necessity, be referred to the commencement of the cohabitation, nor any warrant for the appellant's ingenious argument, that as the consent interchanged must be referred to some particular point — which he insisted was at the commencement of the cohabitation, and therefore insufficient — the cohabitation which continued afterwards without interruption would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another and, I think, a sounder rule and principle of law, namely, that you must infer consent to have been given at the first moment when you find the parties able to enter into the contract."

To the same effect were the opinions delivered by Lord Chelmsford, lord chancellor, and Lord Cranworth.

The *Breadalbane Case* was decided in 1867. L. R. 1 H. L. Cas. 182. At a later period, in 1876, the House of Lords was called upon, in the case of *De Thoren v. The Attorney-General*, to deal with a set of facts in all respects the exact counterpart of the case which is now before this court. The case is reported in 1 App. Cas. L. R. 686.

The point before the court in that case is thus stated by Lord Chelmsford: "The question," he says, "to be determined is, whether there was a consent to a marriage between William Ellis Wall and Sarah Ogg, evinced by habit and repute, prior to the birth of the elder of their sons. If there were no other question than this in the case, there would be no difficulty in giving an answer in the affirmative. But the appellant, although he admits that there had been such cohabitation of the parties as husband and wife as in ordinary cases would have conclusively established the presumption of a marriage by consent, yet contends that the circumstance of a previous ceremony of marriage having taken place between the parties, which was invalid, though unknown to them to be so, prevented that presumption. The ground of this argument is, that the living together of the parties as husband and wife must be attributed to

the invalid ceremony, and, therefore, that the habit and repute could not be evidence of any other consent."

The invalidity of the ceremonial marriage alluded to was, that the husband was not, at the time of his second marriage, lawfully divorced from his first wife, and although he became a divorced man shortly afterwards, neither he nor his second wife appear to have known of the removal of the impediment. It is evident that every question raised by the case in hand was presented also upon the facts of that case. By the unanimous judgment of the House of Lords it was decided:

1. That the subsequent cohabitation and reputation were not to be referred to the inefficient ceremony, even though the parties did not know of the removal of the impediment to their original marriage.

2. Where parties are cohabiting matrimonially but unlawfully, because of impediment in their marriage, matrimonial consent must be presumed to have been interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.

3. The ceremony, although invalid, was a consent by the parties to a cohabitation which was matrimonial in character, and their subsequent cohabitation was proof of a continuing consent thereto.

To the principles thus announced I give an unqualified assent. It is especially material to the matter in hand to note that in every opinion delivered the doctrine of presumption of consent is treated as a principle having its root in public policy. At no time was it regarded as a rule of evidence for determining whether the parties had interchanged consent. Such a consideration is evidently out of place, for the reason that the whole fabric of the doctrine rests upon the necessity of presuming something which is not proven, and that something is consent, and consent at a time favorable to the end which the rule of public policy has in view. That end is the uniform reference of matrimonial conduct to the *status* of marriage, for it is with the *status* of marriage society is chiefly concerned. The contract is made by the parties without consulting society; the *status* is imposed by society without consulting the parties. The contract may be actual and ceremonial, or actual and non-ceremonial, or it may be neither actual nor ceremonial, but simply presumed from the policy of the law. That policy is, as I have said, that all matrimonial conduct shall, if possible, be referred to a matrimonial *status*. Where the marriage is actual the *status* at once arises, in order that connubial conduct and repute may be under its sanction; and where the conduct and repute are matrimonial, consent is presumed in order that the *status* may at once arise. If, at the time of the commencement of matrimonial conduct and reputation, there is impedi-



ment to the application of this doctrine, the rule of public policy is not thereby defeated; it remains in abeyance, to be imposed at the first moment when conduct and capacity shall so co-exist as to render it possible. If an actual marriage has been solemnized, that circumstance, so far from frustrating the policy of the law, affords the strongest possible case for its application; for where the character of the consent is not in question, but simply its legality, the *status* of marriage should arise at the earliest moment when the parties are enabled lawfully to do that which they had theretofore ineffectually attempted.

From the broad principle thus laid down we turn to the decision of the case in hand, the doctrine of which is, that consent cannot be presumed from matrimonial conduct and reputation in any case in which the parties have actually celebrated a marriage to which, in their own minds, they referred their conduct. In support of this proposition two cases are cited in the opinion adopted by this court — *O'Gara v. Eisenlohr*, 38 N. Y. 296, and *Cartwright v. McGown*, 121 Ill. 388. No such doctrine is laid down by these cases, nor do the facts of either case call for or admit of such conclusion.

*O'Gara v. Eisenlohr* was a case in which the original union of the parties was illicit, because the man had a wife living the date of whose death was unknown. The court was asked to raise the presumption that her death had occurred between certain years. The case turned entirely upon the law relative to presumptions of death, and does not touch the doctrine concerning the presumptions of marriage. If it is possible to regard this case as an authority upon the proposition now before us, its weight is entirely against the position of the court below, in that it mentions with approval the cases of *Fenton v. Reed*, 4 Johns. 52, and *Rose v. Clark*, 8 Paige, 574, in both of which the doctrine which I am now seeking to enforce is declared in the clearest manner.

In *Fenton v. Reed* the facts were, that after the prolonged absence of her husband the plaintiff married Reed. Subsequently the first husband came back, the plaintiff and Reed continuing, however, to live together as man and wife until and after the death of plaintiff's first husband. The court held that, upon this state of facts, it was a question for the jury whether the circumstance of this cohabitation evinced a marriage, other than the actual one, occurring after the death of the first husband.

In *Rose v. Clark* the facts were substantially those of *Fenton v. Reed*. Chancellor Walworth, in reviewing the cases, says: "It appears from the decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recogni-

tion, continued matrimonial cohabitation and general reputation, even where the parties originally came together under a void contract of marriage."

It may, I think, be safely asserted that no case can be found in the New York reports from 1809, when *Fenton v. Reed* was decided, down to *Gall v. Gall*,<sup>1</sup> decided in 1889, in which any different doctrine has been held or even intimated.

The other case relied upon is *Cartwright v. McGown*, in which the facts did not raise the question presented by the case before us, but in which, strangely enough, the judge who delivered the opinion of the court imagined, as an illustration, just such a state of facts as that with which we have to deal, and said: "That in such a case the presumption of marriage would apply even though the parties may not have known of the removal of the impediment to their original marriage."

The doctrine of the present case derives, therefore, no support from the only cases cited as sustaining it. If any authority for such a doctrine exists elsewhere I have failed to discover it. It stands, as it appears to me, as an innovation upon established law upon a most important branch of jurisprudence, and is radically destructive of the principle of public policy to which I have alluded, the uniform application of which is illustrated, amongst others, by the distinguished authority to which I have referred.

For these reasons I cannot vote to affirm the judgment rendered in the Court of Chancery.<sup>2</sup>

For reversal — GARRISON (the majority of the court being for affirmance).

A motion having been subsequently made for re-argument, the same was refused, the opinion of the court being delivered as follows by Beasley, J. (Reported in 47 N. J. Eq. 556.)

BEASLEY, C. J. This motion is refused, and the record is ordered to be remitted.

Inasmuch as it appears that counsel has misconceived the ground on which this case was decided by this court, it seems proper that I should state that ground as it was understood by me.

This court was called upon to apply the law to the following facts, viz.: In the year 1867 one Abraham Voorhees brought suit in the Superior Court of Connecticut for divorce against his wife Camilla for desertion. This proceeding was a fraud from beginning to end, on the part of the plaintiff. No notice of it was given to the wife, who at the time was a resident of this state, and, consequently,

<sup>1</sup> 114 N. Y. 109; see, also, *Hynes v. McDermott*, 91 N. Y. 451.

<sup>2</sup> See, also, *Adger v. Ackerman*, 115 Fed. 124; *Barker v. Valentine*, 125 Mich. 336.

according to the decision of this court in the case of *Doughty v. Doughty*, 1 Stew. Eq. 581, the decree that ensued was, in this jurisdiction, an absolute nullity. This being the situation Voorhees married a second time, and the question to be decided was with respect to the validity of this latter marriage. On that subject this court held, in the first place, that inasmuch as the divorce granted in Connecticut was absolutely void in this State, such second marriage had no legal force whatever. This was a necessary conclusion, as long as the case just cited remained unreversed. But another question arose. It appeared that after this second marriage the first wife obtained a divorce from her husband, and that subsequently to that occurrence Voorhees cohabited with his so-called second wife, and treated her before the world as though he were married to her. And it was urged that such cohabitation formed the basis of an inference that there had been an interchange of consent to marriage after the dissolution of the first marriage. This inference was rejected by this court on two grounds: First, that an interchange of consent was not to be deduced from cohabitation accompanied with matrimonial habit and repute, in a case wherein it appeared that the parties had been living together as husband and wife by force of a ceremonious marriage, to which as a valid act one of the parties, in point of fact, had not assented. The court found as a fact in this case that the husband, Voorhees, knew that he had no legal power or right to contract this second marriage; that he was aware that the divorce fraudulently obtained by him was a nullity; what he did consent to was to deceive the so-called second wife and to live with her with the appearance of being married to her; he did not consent to marry her in any legal sense whatever. Under these circumstances, this court decided that his continued cohabitation with this woman, after the obstacle to their marriage had been removed, did not prove that he had changed his original intent, which was to live with her without being legally married to her. It was deemed that cohabitation with habit and repute, being accompaniments of the original *status*, could not, *per se*, be taken as proof that a new *status* had been agreed to by the parties. Voorhees, as just stated, had consented to an illegitimate connection, attended with the concomitants of habit and repute. The continuance of such concomitants could not, by their unassisted probative force, lead, with any show of reasoning, to the conclusion that the man, when he was at liberty to form a legal connection with the woman, had embraced the opportunity. To treat evidence which was in all respects and to the utmost degree in accord with the original purpose as proving, *proprio vigore*, a change of such purpose, appeared

to be not only inadmissible according to legal rules, but as being in logic ridiculous.

This construction of the evidence, it was believed, stood opposed to but a single case, which is that of Breadalbane, reported in L. R. 2 H. L. Sc. 269. The doctrine of that case is supported by nothing that preceded or that has followed it, and is altogether anomalous, and, as it seems to me, it was properly rejected by this court. In that case the court acted upon the principle, that if a man and woman agreed to live together adulterously, with a simulation of marriage, that there should be an inference of a subsequent valid marriage, from the fact that such simulation had been continued after the death of the husband of the adulteress. Why such an inference is to be thus deduced is not apparent, unless it be for the promotion of adultery. By its prevalence the adulterous purpose is converted into a matrimonial purpose, without a particle of reasonable evidence in support of the alleged change of intention. Such a course is opposed, as it seems to me, to morals and public policy. Lord Westbury read the opinion in the case, and he has no better reason to offer in favor of the principle adopted than that he can find no ruling the other way. He does not pretend that he can find anything in its favor, and in his remarks he strangely compares the case before him with those instances where the parties intended originally to marry and not to commit adultery, their intent being frustrated by the existence of some unknown obstacle. And yet it is presumed that no one who will look with any care into the subject will have the slightest doubt that these two classes of cases, with respect to the methods of their proof, respectively rest upon entirely different foundations; for when the parties have intended marriage, being ignorant of an existing impediment, all that is to be established by cohabitation apparently matrimonial, subsequent to the removal of such impediment, is the carrying into effect by the parties of their original purpose; but when the original purpose was to live in adultery, the evidence, under similar circumstances, must be sufficient to show an abandonment of such purpose and the execution of a new one. These lines of cases can be confounded only by want of careful observation of the principles upon which they rest.

Nor in the present case would the result have been varied if the rule thus rejected had been adopted, for the evidence before the court, reasonably construed, would have been deemed to be opposed to the contention of the appellants.

The proofs on the subject amount to demonstration. The second wife was one of the witnesses in the cause, and she testified that she never knew, or had the least intimation, until after the death of her



husband, that the validity of their marriage was, in any respect, called in question; and when she was asked, "Was any other marriage ceremony ever performed in which you and Abraham Voorhees were the contracting parties?" her answer was "There was not." Further than this, she was then fully examined by her own counsel, and she made no pretense of any other interchange of consent to marriage between herself and the man she cohabited with except such as had been given at the time of their ceremonious nuptials. Most certainly this evidence, if we apply to it the ordinary legal tests, is entirely conclusive, and absolutely proves that there never was any second marriage, in any form whatever, between these parties. It is to be borne in mind that cohabitation with matrimonial habit and repute is, standing alone, nothing more than testimony in proof of marriage; the conduct of the persons to whom it relates does not constitute marriage, and, consequently, from its evidential nature it is liable to be rebutted by other proofs. This, as has been already said, was done in the present instance.

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### *Marriage Induced by Fraud.*

HARRISON *v.* HARRISON.

94 MICH. 559.—1893.

APPEAL from Gratiot.

Bill for divorce. Defendant appeals. Affirmed, and case remanded, with directions to permit the defendant to verify his answer, and for a decree in his favor annulling the marriage.

HOOKE, C. J. \* \* \* The proof convinces us that complainant was enceinte at the time of her marriage, and that she succeeded in making him believe that the child, born something over six months after the marriage, was premature and legitimate; and we see no evidence of condonation or of cohabitation after discovery of the truth.

Pregnancy before marriage, concealed from the husband, who has not, previous to marriage, sustained improper relations with the wife, is a fraud which is sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of cohabitation, and abandonment. *Baker v. Baker*, 13 Cal. 87; *Ritter v. Ritter*, 5 Blackf. 81; *Reynolds v. Reynolds*, 3 Allen, 605; *Morris v. Morris*, Wright, 630; *Carris v. Carris*, 24 N. J. Eq. 516. This rule seems to be recognized in the case of *Sissung v. Sissung*, 65 Mich. 180.

The answer lacks the verification required by the statute to be appended to bills for divorce. Answers in the nature of cross-bills require this, and no decree can be granted without it. But it may be amended. The proof shows an absence of collusion, and we will, therefore, remand the case, with direction that such amendment be permitted, and thereupon a decree be entered by the Circuit Court, in chancery, dismissing complainant's bill, and annulling the marriage, as prayed by defendant.

The complainant will recover costs of this court.

The other justices concurred.<sup>1</sup>

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### FARLEY v. FARLEY.

94 ALA. 501.—1891.

APPEAL from the Chancery Court of Montgomery.

The bill in this case was filed on the 18th of September, 1890, by Mrs. Daisy Farley, as the wife of Hoxie C. Farley, and sought a divorce from her husband on the ground of abandonment and adultery, and also alimony. The bill alleged that the marriage was celebrated on the 6th of May, 1890, and that the complainant "is over the age of eighteen years;" and further, that a fraud was practiced upon her in the performance of the marriage ceremony by a person who had no authority to perform it, and without a license from the judge of probate though she was told that one had been procured. There was a demurrer to the bill, assigning various grounds of demurrer; and the decree overruling the demurrer is here assigned as error.

*Per Curiam.* \* \* \* Complainant consented, in fact became the wife of defendant, though beguiled into the assumption at that time, of the status of marriage, by misrepresentations of the legality and binding effect of the formal ceremony. The precise question is, when there is an executory agreement to marry, with the understanding that the parties were not to become husband and wife without formal solemnization, what is the effect of an intervening ceremony, without license, performed by a person unauthorized, imposed on complainant by false pretenses and representations, but believed by her to be lawful and *bona fide*? A marriage procured by deception and fraud, except, it may be, of certain kinds and magnitude, is not absolutely void, but only voidable, and valid for all civil purposes unless and until avoided by the deceived party. The party imposed upon may disaffirm or ratify the contract of marriage after discovery of the fraud; and, it has been held, that voluntary cohabi-

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<sup>1</sup> *Contra*, with a criticism of American cases, *Moss v. Moss*, [1897] L. R. P. D.

tation thereafter as husband and wife is a ratification. As under the rule declared in *Beggs v. State, supra*, a valid marriage may be constituted without license and solemnization, merely by the consent of the parties, certainly complainant may ratify her consent to an immediate marriage, procured by false representations, and thus, by relation, render the marriage good *ab initio*. The contract, however, can be avoided only by the party defrauded. Says Mr. Bishop: "The doctrine seems to require no qualification, that a voidable marriage is, until the act or sentence transpires which renders it void, as good for every purpose as if it contained no infirmity."—1 Bishop's Mar. & Div. sec. 116. If, in answer to the usual questions, though propounded by a person not authorized to solemnize the marriage, both parties consented to a union, defendant is estopped from asserting that the consent was not mutual, or that he did not consent; he will not be permitted to take advantage of his own wrong and fraud to escape the duties and responsibilities of the marital relation. "The party who commits a fraud is bound, and remains bound, until the party deceived has made his or her election and will thereafter be bound, or not, according to the election made."—*Tomppert v. Tomppert*, 13 Bush. 326; *Hampstead v. Plaistow*, 49 N. H. 84; *State v. Murphy*, 6 Ala. 765. The allegations of the bill, fairly construed, show that complainant elected to treat and recognize the marriage as valid.

The averment as to the charge of adultery is, "that said defendant has been guilty of adultery with divers parties and persons, whose names are unknown to your oratrix." The charge is averred with a sufficient degree of certainty. *Holston v. Holston*, 23 Ala. 777.

Affirmed.

The opinion in this case was prepared by the late Judge Clopton, and was adopted by the court after his death.

SMITH *v.* SMITH.

171 MASS. 404.—1898.

KNOWLTON, J. This libel is brought under Pub. St. c. 145, § 11, the first part of which is as follows: "When the validity of a marriage is doubted, either party may file a libel for annulling such marriage, or when the validity of the marriage is denied or doubted by either party, the other party may file a libel for affirming the same." The omission of the words "for fraud or other cause," contained in Gen. St. c. 107, § 4, and in St. 1855, c. 27, does not change the meaning of the provision. The statute assumes that there may be marriages which are legal in form, but invalid in fact. In terms, it confers jurisdiction upon the court, but, in reference to the law of marriage, it is merely declaratory.

The facts of the present case are peculiar. On the day of the marriage, soon after the ceremony, the libelant received information that the respondent was afflicted with a venereal disease called "syphilis." She communicated the information to her mother, who immediately charged him with being so afflicted. He denied the charge, but consented to an examination by a physician. An examination was made that disclosed the fact, which the presiding justice has found, that he was constitutionally afflicted with syphilis, a contagious disease, with which the libelant would become infected in case of cohabitation, "thus seriously impairing her health, and involving consequences of the most grievous character." The judge also found "that the disease would be transmitted to any offspring which they might have; that, while it was not absolutely incurable, the chances of a cure being effected in the state in which the respondent was were very remote and doubtful." The libelant, on learning the libelee's condition, refused to live with him as his wife, and there has been no consummation of the marriage. The libelee, knowing his diseased condition, induced the libelant to contract the marriage without informing her in regard to it. She supposed him to be a man in good health and of good habits, and, if she had known that he was suffering from such a disease, she would not have contracted the marriage.

The statute to which we have referred has several times been considered by this court. *Reynolds v. Reynolds*, 3 Allen, 605; *Donovan v. Donovan*, 9 Allen, 140; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330. The fullest discussion of the law applicable to a case like this of which we have knowledge is in



*Reynolds v. Reynolds, ubi supra.* In that case a marriage was declared void into which a man was induced to enter by confiding in the representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man. It has since been held that, to maintain a petition in such a case, it is not necessary to introduce evidence of express representations, and that a petition cannot be granted if it appears that the petitioner had himself been guilty of criminal intercourse with the woman before the marriage. The precise point decided in *Reynolds v. Reynolds* has been adjudicated in other states, and in this country seems to be generally accepted law. *Baker v. Baker*, 13 Cal. 87; *Carris v. Carris*, 24 N. J. Eq. 516. See, also, *Morris v. Morris*, Wright, 630; *Ritter v. Ritter*, 5 Blackf. 81; *Scott v. Shufeldt*, 5 Paige, 43. The law in England is held otherwise. *Moss v. Moss* [1897], Prob. Div. 263. The opinion of the learned chief justice to which we have referred treats of the law in reference to ordinary contracts procured by fraud, and points out the distinction between contracts to marry or executory contracts of marriage, and executed contracts of marriage. There is no reason why executory contracts of marriage should not be treated, in reference to the fraud of either party, like any other contracts. We think it is well settled that fraud of such a kind, in its essential elements, as would invalidate an ordinary contract, is a good defense to an action upon a contract to marry. *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705. But, after a contract to marry has ripened into a marriage, different considerations affect the case. On grounds of public policy, the law seeks to make the marriage relation in every case as nearly permanent as possible without doing injustice. The difference between the relations of a man and woman affianced and their relations after marriage is more than the difference between those who have made an ordinary executory contract and the same persons after the contract is executed. At marriage there is a change of status which affects them and their posterity and the whole community. It is a change which, for important reasons, the law recognizes, and it inaugurates conditions and relations which the law takes under its protection. It is of such a nature that it cannot lightly be disregarded. The contracting parties take each other for better or for worse, and agree to abide the consequences of misinformation or mistake in regard to each other. Says Chief Justice Bigelow in *Reynolds v. Reynolds*: "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. There-

fore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities which do not constitute the essential and material elements on which the marriage relation rests." The decree of nullity was entered in that case, not merely because the libelant was deceived in regard to the supposed chastity of the libelee, for it is generally accepted law that unchastity of either party before marriage will not warrant a decree of divorce or nullity,—but because, besides the unchastity, the woman was in such a condition that she could not properly assume the duties of wifehood. More than that, she was in a condition to introduce into the husband's family spurious offspring, of which he would be presumed in law, if not in fact, to be the father. The deception, viewed in its different aspects, was in regard to facts essential to the very existence of the marriage relation. Her condition in reference to the objects of marriage was somewhat analogous to impotence, which, without reference to fraud, is always held to be a ground for a decree of nullity. So far as we are aware, this is the only particular in which mistake or fraud in regard to the condition, character, or experience of one of the parties to a marriage has been held to be a ground for a decree of nullity or of divorce in favor of the other in this commonwealth. Most courts in other jurisdictions have gone no further in favor of libelants. But in *Cumington v. Belchertown*, 149 Mass. 223, 21 N. E. 435, it appeared that a marriage was set aside for fraud by a court in New York, on the ground that the libelee had been afflicted with insanity before the marriage, and had concealed the fact, and not long afterwards had again become insane. It was held by this court that the marriage could not have been declared invalid for this cause in this commonwealth.

The case at bar rests solely upon fraud in regard to the bodily condition of the libelee. As we have already seen, the previous unchastity of the libelee is not enough to entitle the libelant to relief. Indeed, we are not quite certain from the report that the libelee might not have been constitutionally affected with the disease from his birth. But on the findings of the judge his concealed disease was such as would leave with him no foundation on which the marriage relation could properly rest. It had advanced to such a stage as probably to be incurable. The libelant could not live with him as his wife without making herself a victim for life, and giving to her offspring, if she had any, an inheritance of disease and suffering. While this case lacks the element of introducing a bastard child into the husband's family, which existed in *Reynolds v. Reynolds*, it has

the element of a loathsome, incurable, contagious disease to be communicated to the wife, which the other had not. Few, if any, would be bold enough to say that it was the duty of the libelant, on discovery of the fraud before consummation of the marriage, to give herself up as a sacrifice, and to become a party to the transmission of such a disease to her posterity.

It may be said that this cause for a decree of nullity is not different in kind, but only in degree, from other bodily or mental conditions which the law does not recognize as a good ground for a separation. There are many peculiarities of body or mind, natural or acquired or contracted, which may render one, in a broad sense, unfit for matrimony, and of which, if concealed until after marriage, the law can take no cognizance in a suit for a separation. In proceedings in court it is more difficult to deal with conditions like these in the case before us than with that in *Reynolds v. Reynolds*, because they are obscure, and it is hard to ascertain the truth. For this reason there is more danger in opening the door to libelants in such cases. Yet there may be circumstances in which justice requires that relief should be given. In *Reynolds v. Reynolds* much stress was laid upon the difference between an executory and an executed contract of marriage. But, for fraud in procuring ordinary contracts, the law gives a remedy as well after the contract is executed as before. The learned chief justice did not say exactly at what stage a contract of marriage should be deemed to be executed. Clearly, it is executory up to the time of the ceremony. Viewed in its legal aspect, it becomes a binding marriage as soon as the ceremony is performed; but the full execution of the contract contemplated by the parties in their original agreement is then just beginning, and is to continue during their joint lives. Their status up to the time of the ceremony is that of parties to an executory contract. Their status, as soon as the ceremony is performed, is that of persons legally married, who, with the sanction and under the forms of the law, have assumed new relations to each other and to the state. But these new relations are then rather inchoate than complete, and they do not assume their perfected form so as to have their full possible effect upon the parties and the community until consummation of the marriage. There are therefore reasons why a fraud like that in the present case, discovered before consummation of the marriage, and at once made a ground for separation, should move the court more strongly in favor of the libelant than if the discovery had come later.

1 Bish. Mar. Div. & Sep. §§ 456, 461, 462. The reluctance of the court to recognize such frauds as a ground for legal proceedings is founded on considerations of public policy. These considerations

are much less weighty in a case like the present than if the parties had cohabited for a considerable time before the proceedings were commenced. Although in many cases the distinction between consummated and unconsummated marriages in proceedings for separation has been overlooked, it is distinctly recognized in *Lyndon v. Lyndon*, 69 Ill. 43, and *Robertson v. Cole*, 12 Tex. 356, in each of which cases a decree of nullity was entered when the court said that the ground would have been insufficient if the marriage had been consummated. We do not intimate that the concealed existence of venereal disease in one of the parties to a marriage will ordinarily be a sufficient ground for a decree of nullity. In most cases, presumably, the disease is curable. But, confining our decision to the facts before us, we are of opinion that it was in the power of the judge of the Superior Court to enter a decree for the libellant. Decree for the libellant.<sup>1</sup>

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### DI LORENZO v. DI LORENZO.

174 N. Y. 467. — 1903.

THIS action was brought to have the marriage between the plaintiff and the defendant annulled upon the ground that the former's consent thereto was induced by the fraud of the latter. It is alleged in the complaint, in substance, that prior to the marriage of the parties, in the city of New York, in November, 1891, the defendant falsely represented to the plaintiff that in October, 1891, during a period of time when he was absent from the state, she had given birth to a male child, of which he was the father, whom she exhibited to him as such; that he, believing these representations, and, in order to legitimize the child, was induced to marry the defendant; that without such representations he would not have made the marriage; that the defendant's representations were false, in that she had not given birth to any child, but had fraudulently procured one to produce to the plaintiff for the purpose of inducing him to consent to marry her; that, as a result of the stratagem, he did marry her; that there has been no issue of the marriage; that the falsity of these representations was discovered but a short time before the commencement of the action, and that since their discovery he has not cohabited with the defendant. In answer to the complaint, the defendant denied so much of its allegations as related to the fraudulent representations, and set up an earlier marriage with the plaintiff.

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<sup>1</sup> Accord, *Svenson v. Svenson*, 178 N. Y. 54.



in 1890, which was consummated by cohabitation. After the joinder of issue, the defendant moved for a jury trial, and the trial court framed specific questions of fact, which were tried out before a jury, who rendered a verdict upon each. The first question was whether the parties had been earlier married by an Italian minister as alleged by the defendant. To this question the jury answered, "No." The second question was whether, in October, 1891, or prior thereto, the defendant, for the purpose of inducing the plaintiff to marry her, falsely and fraudulently represented to him that, during plaintiff's absence from the state, she had given birth to a male child, of which he was the father, and whether she then and there produced and exhibited said child to him. To this question the jury answered, "Yes." The third question was whether the plaintiff, relying upon such representations of the defendant, and believing the same to be true, married the defendant in November, 1891, at the city of New York. To this question the jury answered, "Yes." The fourth question was whether said defendant gave birth to said male child, or to any child, on or about October 5, 1891. To this question the jury answered, "No." Upon the action coming on regularly to be heard at a Special Term, the court adopted these findings of the jury, and filed a decision embodying the facts established by the verdict, and, further, finding that at the time of the marriage the plaintiff was seized of real estate of the value of \$65,000, as the defendant well knew; that there had not been any issue of the marriage; that at the time of the marriage the parties were, and ever since have been, residents of the state; that since the discovery of the defendant's fraud the plaintiff had not cohabited with her, and that the plaintiff was entitled to a judgment annulling his marriage with the defendant. The judgment entered upon the decision was appealed from by the defendant to the Appellate Division in the Second Department, where it was reversed, and a new trial was ordered. From the order of reversal the plaintiff has appealed to this court.

GRAY, J. The order of the Appellate Division reversed upon questions of law only, and the facts as found by the trial court, being undisturbed by the determination of the Appellate Division, must be taken to be true.

The theory of the decision by the Appellate Division, as I understand it, is that the fraud in this case was insufficient to warrant the court in annulling the marriage between the parties, and that the considerations of public policy which environ the marriage relation as a status so far take it out of the domain of ordinary contracts as

to render this conclusion necessary. It was considered that the representations of the defendant "worked no wrong for which the law, as at present established," would afford any remedy, in the right to an annulment of the marriage. The prevailing opinion of the learned court is very elaborate and clear, and its conclusions are deliberately reached upon a careful consideration of the authorities. In my opinion, however, it errs in failing to give due effect to the statutory provision relating to the annulment of a marriage for fraud, and in not giving to the element of a free and true consent in a marriage contract that high importance which it has in contracts generally.

The question, therefore, is whether, upon facts establishing that the consent of the plaintiff to marry the defendant was obtained by a fraudulent representation and by a stratagem, causing him to believe that he was the father of the defendant's child, the fraud was of such a material nature as to warrant the court in decreeing the annulment of the marriage contract. The law of this state with respect to matrimonial actions is regulated by statute. The Revised Statutes early conferred upon the chancellor the jurisdiction to declare a marriage contract void and to annul the marriage (2 Rev. St. [1st Ed.] 142), and the Code of Civil Procedure, into which their provisions were carried, confers a general jurisdiction upon the courts of the state, which may be called into exercise for certain causes existing at the time of the marriage. One of those causes is stated to be when "the consent of one of the parties was obtained by force, duress, or fraud;" and the only limitation imposed, where the action is on the ground of fraud, is that it must appear that the parties have not, at any time before the commencement of the action, "voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud." Code of Civ. Proc., § 1743, subd. 4; Id., § 1750. This language is broad, and warrants but the one reasonable construction that the fraud must be material to that degree that, had it not been practiced, the party deceived would not have consented to the marriage.

The statutes of this state declare that marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of parties capable in law of contracting is essential. 2 Rev. St. [1st Ed.] 138. It certainly does differ from ordinary common-law contracts by reason of its subject-matter and of the supervision which the state exercises over the marriage relation which the contract institutes. In such respects it is *sui generis*. While the marriage relation, in its legal aspect, has no peculiar sanctity, as a social institution, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws in its conduct

as in its dissolution. Judge Story said of it that it is "something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts." Story's Conflict of Laws, § 108, note. While, then, it is true that marriage contracts are based upon considerations peculiar to themselves, and that public policy is concerned with the regulation of the family relation, nevertheless our law considers marriage in no other light than as a civil contract. *Kujek v. Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670. The free and full consent which is of the essence of all ordinary contracts is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement, and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule.

In this case the representation of the defendant was as to a fact, except for the truth of which the necessary consent of the plaintiff would not have been obtained to the marriage. It was designed to create a state of mind in the plaintiff, the operation of which would be to yield a consent to marry the defendant in the belief that he was rectifying a great wrong. The minds of the parties did not meet upon a common basis of operation. The artifice was such as to deceive a reasonably prudent person, and to appeal to his sense of honor and of duty. The plaintiff had a right to rely upon the defendant's statement of a fact, the truth of which was known to her and unknown to him, and he was under no obligation to verify a statement to the truth of which she had pledged herself. It was a gross fraud, and, upon reason, as upon authority, I think it afforded a sufficient ground for a decree annulling the marriage contract. The jurisdiction of a court of equity to annul a marriage for fraud in obtaining it was early asserted in this state by the Court of Chancery, at a time when the limited powers of courts of law were inadequate for the purpose. This jurisdiction was expressly rested upon the general power to vacate contracts in all cases where they had been procured by fraud. From this general jurisdiction of equity a contract of marriage was not regarded as being excepted when the

assent to it was the result of artifice or of gross fraud. See *Ferlat v. Gojon*, Hopk. Ch. 478; *Burtis v. Burtis*, Id. 557. If, as it was observed by Chancellor Sandford in *Ferlat v. Gojon*, *supra*, no instance of the exercise of this jurisdiction was to be found in England, it was because the ecclesiastical or spiritual courts had cognizance of matrimonial causes; but he said "the jurisdiction of equity in cases of fraudulent contracts seems sufficiently comprehensive to include the contract of marriage."

In *Scott v. Shufeldt*, 5 Paige Ch. 43, the action was to annul a marriage which the plaintiff had been induced to enter into in order to escape proceedings under the bastardy act, which the defendant had brought against him, upon her oath that he was the father of her child. He subsequently ascertained that the child was by a negro. Chancellor Walworth held that: "If the mother, at the time she charged him [the complainant] as the putative father, and induced him to marry her, under the supposition that the child might be his, knowing that it was not his child, but that it was the child of a negro, she \* \* \* intentionally defrauded the complainant in such a manner as to authorize the court to declare the marriage contract a nullity." The power that was deemed by the Court of Chancery to be inherent in the court in the exercise of its equitable jurisdiction in cases of fraud was soon thereafter expressly conferred upon the courts by the Legislature of the state. In *Blank v. Blank*, 107 N. Y. 91, 13 N. E. 615, the action was to set aside a judgment annulling a marriage contract between the parties upon the ground that the plaintiff (the former wife) had been induced, by untrue statements as to the law, to refrain from defending the action. The fraud upon which the action to annul the marriage had been based consisted in the woman's representation that she was a widow, whereas she had been collusively divorced from a former husband, who was still living. In affirming the judgment in favor of the defendant, it was said by Judge Rapallo, in the opinion, that, "whether the marriage between the defendant and the plaintiff was legal or illegal as matter of law, the fraud by which she was charged with having induced the defendant to enter into the contract was sufficient to justify the court in setting it aside, and she does not in any manner attempt to deny that she was guilty of the fraud charged."

Our attention has been called to cases in the courts of this state and of other states, which seem to hold a different doctrine upon the subject of the judicial annulment of a marriage contract. Whatever may be said in explanation or in differentiation, I think it is sufficient that we rely upon the plain provision of our statute and upon the



application to the case of a contract of marriage of those salutary and fundamental rules which are applicable to contracts generally when determining their validity. If the plaintiff proves to the satisfaction of the court that through misrepresentation of some fact which was an essential element in the giving of his consent to the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage. Such was the judgment of the trial court upon the facts in this case, and I think that the learned justices of the Appellate Division, who concurred in reversing that judgment, were in error in holding that the law of this state afforded no remedy to the plaintiff.

The order appealed from should be reversed, and the judgment entered upon the findings of the Special Term should be affirmed, with costs to the plaintiff in the Appellate Division and in this court.

PARKER, C. J., and BARTLETT, HAIGHT, MARTIN, CULLEN, and WERNER, JJ., concur.

Order reversed, etc.<sup>1</sup>

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### *Marriage Under Duress.*

TODD *v.* TODD.

149 PA. ST. 60. — 1892.

ARGUED April 6, 1892. Appeal No. 273, Jan. T., 1892, by appellant, from decree of C. P. No. 2, Phila. Co., June T., 1888, No. 23, dismissing libel in divorce. Before Paxson, C. J., Sterrett, Williams, McCollum and Heydrick, JJ.

An answer having been filed, the case was referred to Thomas B. Reeves, as master; and he reported in favor of granting the divorce.

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<sup>1</sup> See, also, *Fisk v. Fisk*, 6 App. Div. (N. Y.) 432.

The facts appear in the following opinion of the court below, by Pennypacker, J., sustaining exceptions to the master's report:

"It is admitted that the parties to this proceeding in divorce had had illicit intercourse some time in January, 1885, and that they were married March 12, 1885. The libel charges that the respondent did, by fraud, covin, deceit and duress, practiced on the libellant, directly previous to the time of said marriage, cause him to become a party to said marriage ceremony, by representing to him that she was pregnant and with child as a result of illicit intercourse with libellant; and, by threats of bodily harm, made through her sons and other persons, and by anonymous letters, which libellant has since ascertained were written by the respondent, procured and induced the libellant against his own free will to become a party to said marriage ceremony.

"The act of May 8th, 1854, provides, *inter alia*, that a divorce may be granted 'where the alleged marriage was procured by fraud, force, or coercion, and has not been subsequently confirmed by the acts of the parties.'

"The grounds upon which the court is asked to grant this divorce are, that the respondent procured the marriage by fraud and by duress *per minas*. The alleged fraud consists in the fact that the respondent told the libellant before the marriage that she was pregnant in consequence of the intercourse between them. In order to constitute a fraud it is necessary that the statement should be untrue in fact and that the libellant should have been deceived by it. The respondent testified that she was pregnant at the time and subsequently had a miscarriage. There was nothing to corroborate her statement except the testimony of a woman who judged by appearance, and whose testimony was shaken by testimony upon the part of experts, that she could not form a correct conclusion in this way. The master has found as a fact that the statement was untrue. But was the libellant deceived by it? The intercourse occurred in January, and the marriage took place March 12, following. It may well be doubted whether a woman within that period could herself have any certainty as to her condition. He nowhere says that he believed the statement to be true, and, in fact, the only inference to be drawn from his testimony is that he did not believe it. He says: 'About a week after the intercourse referred to by me she informed me that she was pregnant, and she persisted in stating this up to the time of the marriage. When she first told me she was pregnant, I told her that could not be, because I thought she was too old.' There is no evidence of his reliance upon or even belief in the truth of her representation at the time of the marriage. It is doubtful whether such

a representation, even if false and relied upon in good faith, would constitute sufficient ground for granting a divorce. *Hoffman v. Hoffman*, 30 Pa. 417. It is not alleged that there was any force used to compel the marriage, and in order to justify a divorce under the statute, upon the ground of threats, they must be such threats against the life or to do bodily harm as would overpower the judgment and coerce the will. There must be such a mental condition, as a result of the threats, that the libelant did not and could not in reality consent to the marriage. It does not appear, from the evidence, that the respondent made or knew of any threats against the libelant. She had two sons who were young men. One of them, at the commencement of a dental college in Baltimore, on the 5th of March preceding the marriage, pointed a cocked pistol at the head of a brother of the libelant, and by this means obtained the diploma of the libelant. At the same time he said that he would hunt the libelant until he found him and then shoot him. These facts were communicated to the libelant. Dr. Winder, one of the witnesses, testified that a son of the respondent said to him, that 'if George Todd did not marry his mother he intended to kill him;' and further, that he, witness, was 'perfectly satisfied that they would have killed him,' but whether or not this was brought to the knowledge of the libelant does not appear. The libelant was a man twenty-seven years of age. He was in Syracuse, New York, and the respondent and her sons were in Baltimore. The libelant, in his examination in chief, said nothing as to the effect of these threats upon him or upon his actions in consenting to the marriage, but, on cross-examination, he testified: 'Q. Do you say it was through any fear of bodily harm that you were induced to marry the respondent? A. I do.' This is the only evidence there is to prove the coercion required by the statute. Dr. Winder wrote to the libelant, promising to protect him from any violence on the part of the sons of the respondent until the marriage ceremony would be performed. The libelant went of his own will to Baltimore, and the ceremony was performed by a clergyman in the presence only of Dr. Winder and a wife of one of the sons of the respondent. No force and no threats were at that time made.

"Dr. Winder testified as to a contemporary conversation with the libelant: 'He said either that he was going to, or that he had married Mrs. Finney out of respect for Dr. Finney, and to remedy the wrong he had done him, and that he would never live with her as his wife, and that she would never see him again after the ceremony. That he intended to apply for a divorce. This conversation did occur prior to the marriage.'

" The libelant left the respondent immediately after the marriage and the same day wrote to her:

" ' Mrs. Finney: I cannot call you by another name although you have it. I have this day done that which will save your family and yourself, and only did it for your sons', Willie and Gordon, and your daughter's sake, not for yours. You knew you were trying to do wrong, and the idea of your ever thinking of me is ridiculous. I cannot express my contempt for you.'

" It seems, therefore, to be reasonably clear that, while there were threats of bodily harm made by the sons, the libelant was not coerced by these threats, but that he was induced to enter into the marriage in order to remedy the wrong and save her family from disgrace, in the hope of speedily securing a divorce.

" Neither of the grounds necessary to bring the case within the statute is made out, and the exceptions are, therefore, sustained."

The libel was subsequently dismissed.

Error assigned was the dismissal of the libel.

*Per Curiam*, April 25, 1892:

While it may seem harsh to refuse the libelant a divorce, we are clearly of opinion that he has not made out a case within the act of assembly. The learned judge of the court below has given sufficient reasons for his decree, which render a discussion of the case here unnecessary.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

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### *Marriage in Jest.*

#### MCCLURG *v.* TERRY.

21 N. J. EQ. 225.—1870.

THE CHANCELLOR: The complainant seeks to have the ceremony of marriage performed between herself and the defendant, in November, 1869, declared to be a nullity. The ground on which she asks this decree is, that although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the others present; and that both parties have ever since so considered and treated it, and have never lived together or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing



to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace, and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot; he in the same spirit accepted the challenge, and the justice at their request performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.

Mere words, without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there is no marriage. On this part of the case I have no difficulty.

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I am satisfied that this court has the power, and that this is a proper case to declare this marriage a nullity.

## CHAPTER III.

### HUSBAND AND WIFE.

#### *Wife's Ante-nuptial Contracts with Third Persons.*

LAMB v. BELDEN.

16 ARK. 539.—1855.

**ERROR to the Circuit Court of Arkansas County.**

MR. JUSTICE SCOTT: This action was commenced by attachment. The declaration shows a promissory note executed by Lamb's wife, when a *feme sole*, and her subsequent intermarriage with Lamb. The attachment was levied in April, 1854, upon goods, wares and merchandise, which were taken into the custody of the sheriff. At the October Term, 1854, of the Arkansas Circuit Court, in which this cause was then pending, Lamb pleaded that since the institution of this suit, to wit: on the 1st day of October, 1854, his then late wife aforesaid departed this life, whereby he became exonerated from liability on the demand in the declaration mentioned. To this plea the Beldens interposed a demurrer, which the court sustained, and Lamb, electing to rest, the Beldens suggested and proved the death of Mrs. Lamb, since the commencement of this suit, and the court ordered it to abate as to her, and proceeded to render final judgment against Lamb, who has brought the case here by writ of error.

The authorities distinctly show that the husband is not liable after the death of his wife for debts contracted by her while a *feme sole*, unless judgment has been recovered therefor against him in the lifetime of his wife. Her death extinguishes forever all such liabilities, not at that time in judgment against him. And this is the rule, both at law and in equity, although the husband may have received a fortune by his wife, (besides the authorities cited by the counsel for the plaintiff in error to this point, see *Morrows v. Whitesides' Ex.*, 10 D. Mon. 412; *Buckner v. Smith*, 4 Dessau R. 371; *Witherspoon v. Dubose*, 1 Bayle's Ch. R. 166; Henning's Edition of Noyes' Maxims, 35.)

Under the attachment laws of this State, the property attached, in case it be not released in the manner provided, or its proceeds, if perishable, is to remain in the hands of the officer to abide the judgment of the court on the plaintiff's demand. Thus the lien created

by the statute can never be of any avail to the plaintiff until he obtains a judgment in his favor upon his demand. Until then, his lien is inchoate and imperfect. If he fails to establish his claim, and judgment is rendered against him, his inchoate lien vanishes at once. Thus it is essentially dependent upon the judgment to be rendered in the cause; where, therefore, the defendant interposes by his plea, as in this case, an insuperable obstacle to any judgment upon the plaintiff's demand in his favor, this inchoate lien must necessarily be at end in the judgment that will be rendered upon such a plea.

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In the case before us the law acts upon the remedy by extinguishing the right which was dependent for its life upon the life of the wife.

The judgment must be reversed and the cause remanded.

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### GRAY *v.* THACKER.

4 ALA. 136.—1842.

ERROR in the Circuit Court of Coosa.

Action of debt commenced by the defendant against the plaintiff in error before a justice of the peace.

Plaintiff states that Caroline Burton made her note, payable to the plaintiff for twenty-one dollars and fifty cents, for value received, dated 4th February, 1839, and due one day after date. Since the making of said note, and before the commencement of this suit, she has married said defendant, whereby he became liable to pay said note to the plaintiff. Damage fifty dollars.

To this statement the defendant cravedoyer of the warrant, and pleaded in abatement a variance between the warrant and the statement, in this, that the warrant was sued out against Gray alone, and the statement was against him and his wife.

To this plea the plaintiff demurred, which the court sustained, and gave judgment for the plaintiff for the debt.

From this judgment this writ is prosecuted by the defendant who assigns for error—

1. The judgment of the court sustaining the demurrer.
2. In giving judgment against plaintiff in error.
3. In giving judgment against plaintiff in error alone, while the statement is against him and his wife.

ORMOND, J. We consider, that in accordance with the liberality which has always been extended towards proceedings before justices

of the peace, by this court, the warrant may be considered as sued out against the plaintiff and wife jointly, and that the statement follows the warrant. But the judgment being against the defendant alone, cannot be sustained. The judgment must be against all who are parties to the writ and declaration; and especially in a case like the present, where, if the judgment were properly rendered, in the event of the death of the husband, would survive against the wife, but as this judgment is rendered would survive against the representative of the husband.

Let the judgment be reversed and the cause remanded.

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### PARKER v. COWAN & DICKINSON.

1 HEISK. (TENN.) 518.—1870.

IN the Circuit Court, before E. T. Hall, J.

NICHOLSON, C. J. Plaintiff in error, whilst a *feme sole*, bought goods, wares and merchandise, of defendants in error to the amount of \$1,232. She afterwards married, and in settlement of said account, her husband and herself executed their joint note to defendants in error, for the amount of the account. Soon after the death of Wm. Parker, her husband, the attorney of defendants in error, called on plaintiff in error, and presented to her the note and account, and requested payment. "She replied that she could not pay the debt just then but said it was a just debt, and she did not intend that the estate of her late husband, William Parker, should pay any part of the debt, as it was her debt that she made before she married him. She said that she would pay the claim, and asked indulgence for a short time, which witness promised to give and did give."

Upon the failure to pay, suit was brought against her in the Circuit Court of Monroe county. The declaration contained two counts—one on the account and the other on the note. The plaintiff in error put in the plea of *nil debit*, and several special pleas, to the effect that she was not liable on the account, because it was extinguished by the note, and not liable on the note, because she was a *feme covert* when it was executed. To these pleas there were replications and issues joined.

The jury found a verdict in favor of defendants in error on the second count of the declaration, which was on the note; and upon the court discharging a rule for a new trial, plaintiff in error appealed in error to this court.



When the circuit judge came to charge the jury, he was requested by the plaintiff in error to withdraw from them the evidence before detailed, as to the promises by plaintiff in error to pay the debt soon, and her request for indulgence. The judge refused to withdraw the evidence; and his refusal to do so is the error now relied on for a reversal of the judgment.

The first question to be decided is, what was the legal effect of the execution of the note by complainant and her husband on the account made by complainant before her marriage? Was it an absolute extinguishment and satisfaction of the prior indebtedness resting upon the account? In *Chitty on Bills*, 172, it is said: "A person, by taking a bill of exchange or promissory note, in satisfaction of a former simple contract debt, or of a simple contract debt, created at the time, suspends his remedy, and is precluded from afterwards waiving it, and suing the person who gave it to him for the original debt, before the bill has been dishonored; for the taking of the bill is *prima facie* a satisfaction of the debt, and, at least, amounts to an agreement to give the person delivering it credit for the length of time it has to run." In *Robinson v. Branch*, 3 Sneed, 506, it was held that "the execution of a note, under seal, is *prima facie* evidence of a settlement of all pre-existing accounts between the parties, and casts the burden of proof upon the party asserting otherwise." It follows that the execution of the note by complainant and her husband was not an absolute extinguishment and satisfaction of the original debt. It was a suspension of the right to sue on the original debt until the note was dishonored; and it was *prima facie* evidence that the account was settled and satisfied.

The next question is as to the legal effect of the execution of the note by complainant, she being at the time a *feme covert*. With certain exceptions, a married woman is incapable of entering into any contract so as to bind herself personally, or of suing or being sued in her own name, during her coverture.

By the execution of the note, therefore, she incurred no liability to be sued. But it does not follow that the original debt was thereby in any way affected. By her marriage the law suspended the right of her creditor to enforce his claim by suit against her; he could only enforce the claim by suit against her husband. The giving of the note by the husband had no other effect on the original debt, as we have seen, than to suspend the right of the defendant in error to sue, except upon the note, until payment thereof was refused. After payment of the note was refused, suit could be brought against the husband on either the note or the account; but during the coverture, suit could be brought against the wife alone upon

neither the note nor the account. This was the legal consequence of her being a married woman. But whilst the note, during the coverture, created no obligation upon her, yet it cannot properly be said to be a contract void *ab initio*, as it would have been if given for a debt created during the coverture. Having been given for a legal liability existing before her marriage, the note can only be regarded as a nullity and as having no obligatory force during the coverture, and not after she became discovert, unless so ratified as to revive the original liability.

The next question is, as to the legal effect of the promise made by plaintiff in error after she became discovert. It must be conceded that she was then under no legal obligation to pay the note. As the jury found by their verdict that she was liable on the account, and as we are not called on to determine whether that finding was erroneous or not, we need not express any opinion on that point. But as the jury found that the plaintiff in error was liable on the note, and as this finding was manifestly based upon the evidence of her promise to pay, the question is presented, was the circuit judge in error in refusing to exclude that evidence from the jury?

It is well settled that "a moral obligation is not alone sufficient legal consideration to support either an express or implied promise." 1 Story on Contr., sec. 465. But this general rule is subject to this exception: "A moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law, but for the interference of some rule of law." 1 Parsons on Contr., 361; 1 Story on Contr., sec. 466.

If plaintiff in error had been under no previous liability to pay the debt for which the note was given, her simple promise to pay would have created no liability, as it would have been a promise to pay a contract void *ab initio*, and, therefore, not capable of ratification. 1 Story on Contr., sec. 468. But because she was under a legal obligation, before her marriage, to pay for the goods purchased, when the impediment to the enforcement of that obligation, produced by her marriage, was removed by her becoming discovert, this previous legal liability constituted a sufficient moral obligation to support the promise to pay the debt. When the note and account were presented to her and payment was requested, her promise to pay the debt might well be regarded by the jury as virtually a re-delivery, as well as a ratification of the note; and being under a moral obligation to pay, as she freely acknowledged, the verdict of the jury was well supported by the proof.

There was, therefore, no error in the refusal of the circuit judge to exclude from the jury the evidence of the promise by plaintiff in error to pay the debt, and we affirm the judgment.

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*Wife's Post-nuptial Contracts with Third Persons.*

FARRAR *v.* BESSEY.

24 VT. 89.—1852.

BOOK ACCOUNT. The action was commenced before a justice of the peace, and came to the County Court by appeal. Judgment to account was rendered in the County Court, and an auditor was appointed, who reported the facts.

Upon these facts, the County Court rendered judgment for the defendants upon the report. Exceptions by plaintiff.

ROYCE, Ch. J. This was an action of book account, brought to recover a balance claimed to be due from the wife. The whole of the plaintiff's account, except one item of fifty cents, on the debit side, and two items of credit, amounting to two dollars and fifty cents, accrued before the intermarriage of the defendants. They presented no account before the auditor, but relied on the statute of limitations. To this defense two answers were attempted before the auditor, but only one of them is now insisted on. This is based upon the fact, that the three items referred to accrued within six years before the commencement of the action. And these entries are found to have been justified by real transactions between the parties. But the report shows that this part of the account accrued after the defendants had intermarried. When it accrued, the wife was no longer capable of contracting a debt against herself, nor was she entitled to claim the benefit of these credits, except as payments made by her husband upon her debt. In legal effect, this part of the account arose between the plaintiff and the husband alone; so that the account properly existing with the wife, was not brought down to a time within the six years. *Gay et ux. v. Estate of Rogers*, 18 Vt. 342. It is found by the auditor, however, that the services of the wife, which constituted these two items of credit, were, by the express consent of both defendants, received to be applied in part payment of the previous account against the wife. They must have the application which was then intended. And the general rule is, that the admission of a debt by part payment, is sufficient to warrant the implication of a new promise to pay the unsatisfied bal-

ance. *Strong v. McConnell*, 5 Vt. 338; *Joslyn v. Smith*, 13 Vt. 353; *Munson v. Rice* and *Sanderson v. Milton Stage Co.*, 18 Vt. 53-107.

But to authorize the implication of such new promise, from part payment, or other acknowledgment of a debt, the party whose promise is implied must be legally capable of making a valid and binding express promise. And as a *feme covert* cannot make such a promise in her own right, especially while living with her husband, it follows that no effectual promise of the wife can be implied in the present case, from the fact of this part payment of her debt. This is a legitimate and obvious conclusion, from the doctrine held in *Pittam v. Foster et al.*, 8 C. L. R. 67. And we think it must, from the decision of this court in *Powers v. Southgate and Wife*, 15 Vt. 471, that no promise of the husband, which could affect the rights of his wife, under the statute of limitations, was to be implied from the payment made by him. The cause of action against the wife, was therefore barred; and the present suit, founded on the assumption of her continuing liability, could not be sustained. The judgment of the County Court is accordingly affirmed.

### SHEPPARD v. KINDLE.

3 HUMPH. (TENN.) 80.—1842.

GREEN, J. The declaration in this case sets out as the cause of action, that Nicy B. Sheppard, then and still being the wife of George P. Sheppard, on the 9th of August, 1838 (together with Allen B. Lane and B. Edmundson who are not sued), made her promissory note, payable ninety days after date, by which she promised to pay the plaintiff three hundred dollars. In the court below, the plea was withdrawn and a judgment was taken *nil dicit*, and a motion in arrest of judgment made and overruled.

It is not insisted here that the note executed by Nicy B. Sheppard, a *feme covert*, created any legal obligation on her, or her husband George P. Sheppard; but it is said her coverture should have been pleaded in abatement. When a *feme covert* executes an obligation, and afterwards marries and is sued alone, the plea in abatement, because the husband is not joined, is the proper defense. In that case, the defense does not go to the cause of action, but the form in which it is brought. But in the present case, there is no sufficient cause of action. The note executed by the *feme covert* creates no right of action against her, or her husband. Consequently, if the facts had not appeared in the declaration, a plea in bar would have



been the proper defense. But the declaration sets out the facts which show there is no cause of action, and consequently it is bad upon general demurrer, or may be taken advantage of by motion in arrest of judgment. We think, therefore, the judgment should have been arrested, and the Circuit Court refusing to do so, the judgment must be reversed.

## FOSTER v. WILCOX.

10 R. I. 443.—1873.

ACTION of covenant to recover damages for a breach of covenant of quiet enjoyment given by the defendants' ancestor.

DURFEE, J. This is an action to recover damages for the breach of a covenant of quiet enjoyment contained in a lease to the plaintiff, executed May 26, 1840, by Horace A. Wilcox and Sally B. Wilcox, his wife. The plaintiff was evicted from a portion of the demised premises by the holders of the rightful title, in August, 1861, during the continuance of the lease, and in the lifetime of the lessors. The action is prosecuted against the defendants as the heirs-at-law and devisees of the said Sally B. Wilcox. The case is tried to the court, trial by jury having been waived.

The first question presented is whether the action can be maintained,—the objection to its maintenance being that the covenant of a married woman does not bind her, and consequently cannot bind her heirs or devisees. The plaintiff's counsel admits that the action would not lie against Sally B. Wilcox, if she were alive, but contends, nevertheless, that the covenant is not so wholly void that an action cannot be maintained for a breach thereof against her heirs and devisees. The argument seems to imply or assume that the obstacle to the enforcement of the contracts of a married woman is not her inability to contract but her immunity from suit. If this were so, however, her exemption would continue only during her coverture. Her exemption is much more absolute. The strongest cases against her subject her to liability only in case of a new provision made after she has become discover; *Lee v. Muggeridge*, 5 Taunt. 35; *Franklin v. Beatty*, 27 Miss. 347; while a still more authoritative current of decision is to the effect that her contract made during coverture is not affirmable even by a new provision after she becomes discover, without a consideration; *Lloyd v. Lee*, 1 Str. 94; *Meyer v. Howarth*, 8 Ad. & El. 467; *Wennall v. Adney*, 3 B. & P. 247, note; *Watkins v. Halstead*, 2 Sandf. 311; *Littlefield v. Shee*, 2 B. & Ad. 811; unless, at least, the consideration of the original

contract was a benefit personally received by her. *Goulding v. Davidson*, 26 N. Y. 604.

The plaintiff's counsel refers to cases which hold that a widow is bound by the covenants contained in a lease of her lands, executed by her and her husband during his life, but not in a way to bind her, in case she accepts the rent after his death. See *Wotton v. Hele*, 3 Saund. (Wms. ed.), 180. But these cases, in so far as they are authoritative, do not appear to hold that the covenants have any validity against her previous to her acceptance of the rent; but only that by accepting the rent she affirms the lease and her covenants therein, and thus gives them validity. *Worthington's Lessee v. Young*, 6 Ohio, 313, 335. In the case at bar, it is doubtful if an acceptance of the rent could be construed to have any such effect; for, aside from the covenants, the lease is valid without any affirmation. But if it be otherwise, there has been no acceptance of any rent, since the death of Horace A. Wilcox, for that portion of the demised premises from which the plaintiff has been evicted; and certainly if an affirmation is to be implied from an acceptance of rent, it can be implied only to the extent to which the rent has been accepted.

The plaintiff's counsel refers to the cases of *Nash v. Spofford*, 10 Met. 192, and *Hill's Lessee v. West*, 8 Ohio, 226, which hold that a covenant of warranty in the deed of a married woman is operative against her by way of estoppel. But the courts which allow the covenant this negative efficacy do not allow it any other effect; *Fowler v. Shearer*, 7 Mass. 14; *Colcord v. Swan*, 7 Mass. 291; *Wadleigh v. Sutton*, 6 N. H. 17; and there are cases which hold that the covenant is not operative even by way of estoppel to transfer an after-acquired title. *Jackson v. Vanderheyden*, 17 Johns. 167; *Den v. Demarest* 1 Zab. 525, 541. And see *Wight v. Shaw*, 5 Cush. 56, 66.

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Judgment must be given for the defendants for their costs.

## GREGORY v. PIERCE.

4 MET. (MASS.) 478.—1842.

ASSUMPSIT on a promissory note, signed by the defendant in the presence of an attesting witness, dated October 6th, 1825, and payable to Putnam & Gregory, partners, of whom the plaintiff is survivor.

“The defendant was married to Varney Pierce, Jr., in 1806, who, in 1816, became insolvent, and left her and went out of the com-

monwealth, and did not return till 1818, when he came back and remained with her about a week. He then left her and went to Ohio, where he remained till his death in 1832. He made no provision for the support of his wife and family, after he left her in 1816; but she supported herself and family, after he left her, by her own labor, contracting debts and making contracts in her own name. Putnam & Gregory employed her to do work for them, and supplied her with necessaries for the support of herself and family; and the note in suit was given for the balance of account between the parties."

Judgment for the plaintiff, and the defendant appealed.

SHAW, C. J. The principle is now to be considered as established in this State, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm. *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89. In the latter case, it was held, that in this respect, the residence of the husband in another State of these United States was equivalent to a residence in any foreign State; he being equally beyond the operation of the laws of the commonwealth, and the jurisdiction of its courts.

But to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign State or country, which is held to operate like an abjuration of the realm.

In the present case, the court are of opinion, that the circumstances stated are not sufficient to enable the court to determine whether the husband had so deserted his wife, when the note in question was given. The only facts stated are, that he was insolvent when he went away; that he was absent, residing seven or eight years in Ohio; that he made no provision for his wife and her family, after 1816; and that she supported herself and them by her own labor. But it does not appear that he was of ability to provide for her; that he was not in correspondence with her; that he declared

any intention to desert her when he left, or manifested any such intention afterwards; or that he was not necessarily detained by sickness, imprisonment or poverty.

The fact of desertion by a husband may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife, with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances tending to prove the absolute desertion before described. The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception. In an agreed statement of facts, such fact of desertion, using this term in the technical sense above expressed, as a total renunciation of the marriage relation, must be agreed to, or such other facts must be agreed to as to render the conclusion inevitable. If the facts stated are all that can be proved in the case, the court would consider that the plaintiff had not sustained the burden of proof, and, therefore, could not have judgment. See *Williamson v. Dawes*, 9 Bing. 292; *Stretton v. Bushnach*, 4 Moore & Scott, 678; S. C., 1 Bing. N. R. 139; *Bean v. Morgan*, 4 McCord, 148. But apprehending that the statement may have been agreed to, under a misapprehension of the legal effect of the facts stated, and that other evidence may exist, the court are of opinion, and do order, that the agreed statement of facts be discharged, and a trial had at the bar of the Court of Common Pleas.

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### *Wife's Contracts for Necessaries.*

#### GAFFORD *v.* DUNHAM.

111 ALA. 551. — 1896.

COLEMAN, J. F. W. Dunham sued the appellant, F. H. Gafford, and his wife, M. B. Gafford, upon an account for groceries and supplies alleged to have been sold by one Boggan, the assignor of plaintiff. The uncontroverted evidence shows that the articles were sold to, and upon the sole credit of, M. B. Gafford. The contract for their purchase was made for her only, and all payments which had



been credited upon the account were made by her. The articles were charged to her, and the name of F. H. Gafford nowhere appears upon the books of account, nor is it pretended that at any time was he regarded as the debtor. After hearing the evidence, the court, without the intervention of a jury, rendered judgment in favor of M. B. Gafford, and against the husband, F. H. Gafford, who prosecutes the present appeal. At the trial, the wife interposed the plea of coverture, and the failure of the husband to give his assent in writing to the contract. This plea was fully sustained by the evidence. We presume the court rendered judgment against the husband, upon the ground that as the contract made with the wife was void, and as the evidence showed that the articles purchased were necessities of life, and suitable to the degree and station in life of the wife of F. H. Gafford, his common-law liability arose, and he was chargeable for such necessities furnished to her. Considered with reference to the evidence as to the furnishing of the articles to the wife, or as to the common law liability of the husband for necessities furnished to the wife, the conclusion of the court was erroneous. The common law liability of the husband for necessities and suitable comforts has always rested upon the assumption that credit was given to the husband, and not to the wife, and that the purchase was made with his implied assent. In no case did this liability arise when the facts showed affirmatively that credit was given to the wife, and charged to her, and not to the husband, and the goods were sold not upon his implied assent that they were to be charged to him. *Hughes v. Chadwick*, 6 Ala. 651; *Pearson v. Darrington*, 32 Ala. 231; *O'Connor v. Chamberlain*, 59 Ala. 431; *Gayle v. Marshall*, 70 Ala. 522. •

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The judgment is reversed, and a judgment will be here rendered in favor of the appellant. Reversed and rendered.

### VUSLER v. COX.

53 N. J. LAW, 516.—1891.

ON *certiorari* to Warren Pleas to review a judgment of that court upon the trial of an appeal from a Justice's Court.

This suit was brought by Dr. Henry M. Cox, a physician, against the executors of George Vusler, deceased, to recover a bill for medical services rendered to the testator's wife between March 27th, 1883, and October 2d, of the same year. The testator died in May, 1886.

The court certified that prior to May, 1880, the testator and his wife lived together for five or six years; that on or about the 5th day of May the testator's wife, in his absence, moved away from his house and left him, and went to her brother's house, a few miles away; that she removed from her husband's house everything that belonged to her; that when she took away the last load of goods she told her husband that she was going to leave and was not coming back again; that the testator, after his wife left, lived with his sons until his death; that his wife never returned to him, but continued to reside at her brother's house, and that it was during her illness at her brother's house that the plaintiff rendered the professional services sued for.

The court further certified that it did not appear that the wife had any reason for leaving her husband, and that it did not appear that the plaintiff had any knowledge that the testator's wife was not living with him — the doctor denying that he knew anything about it.

DEPUE, J. It may be inferred from the case certified, and will be assumed, that the plaintiff rendered these services to the testator's wife without knowledge that she was living in a state of separation from her husband.

The liability of a husband on a contract made by the wife is usually ascribed to those principles which are applicable to the relation of principal and agent.

Where husband and wife are living together, the wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and for articles furnished to her for her personal use suitable to the style in which the husband chooses to live. Under such circumstances the presumption is in favor of the wife's authority to contract on behalf of her husband. 1 Ev. Pr. & A. 166; *Wilson v. Herbert*, 12 Vroom. 454; *Folly v. Rees*, 15 C. B. N. S. 628; Notes to *Manby v. Scott*, 3 Sm. Lead. Cas. (9th ed.), 1757.

But where the husband and wife are living in a state of separation, the presumption is against the authority of the wife to bind the husband by her contract. Under such circumstances the general rule is that the husband is not liable. To this rule there are two exceptions pertinent to this inquiry, the first of which is where husband and wife separate and live in a state of separation by mutual consent, without any provision for her maintenance or means of her own for her support; the other, where the wife leaves her husband under the stress of his misconduct of such a character as in law is regarded as a justifiable cause for the wife's quitting her husband's society. In

such cases, the presumption being against the liability of the husband for the wife's contract, the burden of proof is upon the party seeking to enforce against him a liability for her contract. He must show affirmatively the special circumstances which shall fix the responsibility on the husband in order to establish his cause of action. *Mainwaring v. Leslie*, 1 Moo. & M. 18; *Johnston v. Sumner*, 3 Hurlst. & N. 261, 268; *Blowers v. Sturtevant*, 4 Den. 46; *Breinig v. Meitzler*, 23 Penna. St. 156; *Snover v. Blair*, 1 Dutcher, 94; 2 Kent, 147. The cases, English and American, on this subject, are collected in the American editions of Smith's Leading Cases under the head of *Manby v. Scott*.

The certificate of the Court of Common Pleas states that it did not appear that the wife had any reason for leaving her husband, and the facts set out in the certificate tend to show that she left him of her own volition, and without any justifiable cause.

Nor will the fact that the plaintiff had no knowledge that the wife was living separate from her husband avail to relieve the plaintiff from the burden of proof. Independently of agency, express or implied from cohabitation, the liability of the husband upon contracts made by the wife pledging his credit arises from the acts or misconduct of the husband. As was said by Lord Selborne, there is no mandate in law from the fact of marriage only, making the wife the agent in law of her husband to bind him and pledge his credit, except in the particular case of necessity — a necessity which may arise where the husband has deserted the wife, or has by his conduct compelled her to live apart from him. *Debenham v. Mellon*, 6 App. Cas. 24, 31. On any other hypothesis a wife living separate from her husband without justifiable cause, or even through her own misconduct, would have it in her power to pledge his credit by seeking persons with whom to deal who were unaware of the family relations.

There being no proof of facts from which agency might be implied, and from the fact that the wife was living apart from her husband, the presumption being that she had no authority to bind the husband, the plaintiff could make no case against the husband except on proof of those particular circumstances from which the husband's liability would result as a mandate in law. To make out a cause of action against the husband, the plaintiff was bound to prove those special circumstances from which alone the husband's liability for the plaintiff's demands would result. Without such proof he had no case.

Upon the case as certified the Court of Common Pleas gave judgment for the plaintiff. That judgment was erroneous, and should be reversed.

<sup>1</sup> *Semble*, accord *Constable v. Rosener*, 82 App. Div. 155 (affirmed on opinion of the App. Div., 178 N. Y. 587).

BERGH *v.* WARNER.

47 MINN. 250. — 1891.

MITCHELL, J. It is sought in this action to hold the defendant liable for debts contracted by his wife during coverture and cohabitation. The first cause of action is for the price of a pair of diamond ear-rings, purchased by the wife for her own use; the second is for a small sum for repairing certain articles of her jewelry. The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently spoken of as being of two kinds — *First*, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to furnish; *second*, that which arises from the authority of the husband, expressly or implied conferred, as in other cases. The first of these, sometimes called an "agency in law," or an "agency of necessity," is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable although the necessities were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessities suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show — *First*, that the husband refused or neglected to provide a suitable support for his wife; and, *second*, that the articles furnished were necessities. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

In regard to the much vexed question as to how it is to be determined, in a given case, whether the articles furnished were necessities, the general rule adopted is that laid down by Chief Justice SHAW in *Davis v. Caldwell*, 12 Cush. 512, viz., that it is a question of



fact for the jury, unless in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessities. In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that diamond ear-rings were necessities; yet, so far from there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only other ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied. Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course, the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus impliedly recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she, as the head and manager of his household, is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. *Flynn v. Messenger*, 28 Minn. 208, 9 N. W. Rep. 759; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. Rep. 308. This presumption is founded upon the well-known fact that, in modern society, almost universally, the wife, as the manager of the household<sup>1</sup> is clothed with authority thus to pledge

her husband's credit for articles of ordinary household use. But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable there must have been some affirmative proof of authority from him, either express, or implied from his acts and conduct. In this case there is an entire absence of any evidence of express authority. Indeed, the evidence tends quite strongly to show that it was his expressed wish that his wife would incur no bills, and that his monthly allowance to her of "pin-money" was intended to avoid any occasion for her doing so. The evidence of acts and conduct on part of defendant tending to show that he had clothed his wife with apparent or ostensible authority to buy any such articles on his credit was exceedingly slight. The mere fact that he furnished his wife with expensive wearing apparel had little, if any, tendency to prove any such fact. The same may be said of the evidence that on one occasion he paid a dressmaker's bill of \$136, contracted by his wife, especially as there is no evidence that plaintiff had any knowledge of that fact. As to previous dealings between the parties, the only evidence is that on various occasions plaintiff had sold the wife articles of jewelry for cash, but on one occasion, nearly three years before, he had sold her on credit a bill of jewelry amounting to some \$19, the principal item of which was a pair of opera glasses of the value of \$12, and that this bill was charged on plaintiff's books to the wife, but that the husband, about a year afterwards, paid it. We do not think that the evidence was such as to require a finding that the wife had authority to purchase the articles on the credit of the defendant.

The other assignments of error, affecting the first cause of action, are not of sufficient importance to require further mention than to say that we think they are without merit.

Upon the trial the defendant's counsel stated in open court that "defendant admits the items in the bill for repairs [the second cause of action], but disclaims any liability for the diamond earrings." This must be construed as an admission of the second cause of action. The trial court found against plaintiff on both causes of action. This was, of course, error. Doubtless, it was an oversight, which resulted from the court not having in mind the admission made on the trial. The mistake was one which doubtless would have been prevented or corrected without the necessity of an appeal to this court, merely by plaintiff's counsel calling the court's attention to the matter. Under these circumstances, the amount being only \$6.50, we do not think the appellant ought to recover

statutory costs. The order appealed from is affirmed as to the first cause of action, and reversed as to the second, but without costs to either party.

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WANAMAKER *v.* WEAVER.

176 N. Y. 75. — 1903.

HAIGHT, J. This action was brought to recover the purchase price of goods sold by the plaintiff to the defendant's wife, in the city of Philadelphia, without the defendant's knowledge or consent. The defendant and his wife resided in the city of Rochester, and at the time the goods were purchased lived together as husband and wife. It was claimed on behalf of the defendant that, while the goods might ordinarily be deemed necessities, they were not in fact such, for the reason that the defendant lived on a salary of \$2,000 per year, out of which he delivered to his wife \$1,500 in monthly installments of \$125 with which to supply his table and purchase her necessary wearing apparel; and at the time she purchased the goods in Philadelphia she was amply supplied with articles of a similar character, and was not in need of the articles purchased. Upon the trial the defendant sought to show the character and the amount of clothing possessed by the defendant's wife at the time she made the purchase of the plaintiff in Philadelphia. This was objected to. The objection was overruled, and an exception was taken. The court, in discussing the question, stated the law to be as follows: "That if a married woman goes to a merchant, and within reasonable limitations buys articles suitable for the family use and for her own wardrobe, the presumption is, in the absence of evidence to the contrary, that the husband is liable. But if it appears affirmatively that the lady was abundantly supplied with similar articles, purchased elsewhere, and that there was not, in fact, any reasonable necessity for such expenditure, the husband cannot be held responsible, unless there is some affirmative proof of actual authority outside of the authority the law infers from their marital relations." This view was substantially repeated by the trial judge in his charge to the jury, and an exception was taken thereto. The trial court also submitted to the jury the question as to whether the plaintiff gave credit to the defendant or to his wife. The verdict was in favor of the defendant.

The only question which we deem it necessary to consider is that raised by the exception to the charge as made. Submitting to the jury the question as to whether the defendant's wife was abundantly supplied with similar articles to those purchased at the time of the pur-

chase, and therefore the articles were not necessary for her support and maintenance. The majority of the judges of the Appellate Division appear to have entertained the view that, if the articles purchased by the wife were of the character ordinarily deemed necessities, such as clothing, table linen, towels, and napkins, the merchant was at liberty to furnish her therewith, and charge her husband therefor, without regard to the amount purchased or the necessity therefor. In commenting upon the charge of the trial court, they say in their opinion: "We have, therefore, this principle enunciated: That if a wife, living with her husband, seeks to purchase goods of a merchant, the latter must make inquisitorial examination, and ascertain whether the family possess an adequate supply of the articles which the wife desires to purchase." It will readily be observed that while the amount involved in this case is trivial, the principle is of considerable importance. While the question seems to have been considered in the lower courts, it does not appear to have been squarely decided in this court. In the case of *Keller v. Phillips*, 39 N. Y. 351, the husband had given the merchant notice not to give the wife further credit, and in the case of *Hatch v. Leonard*, 165 N. Y. 435, 59 N. E. 270, the husband and wife lived separate and apart; so that neither of these cases afford us much help in determining the question presented in this case. In the case of *Cromwell v. Benjamin*, 41 Barb. 558, the General Term sustained the right of a merchant to recover of the defendant for the necessities furnished to his wife. J. C. Smith, J., in delivering the opinion, states the law, as he understood it, as follows: "But the husband may be liable for necessities furnished to the wife in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence; and this upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessities to the wife so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessities himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessities." In *Bloomingtondale v. Brinckerhoff*, 2 Misc. Rep. 49, 20 N. Y. Supp. 858 it was held that, in order to entitle the tradesman to recover from the husband, it was incumbent upon him to show that "the articles supplied to the wife were not only of the



kind usually denominated necessities, because their need is common to all persons, but that, in consequence of the inadequacy of the husband's provisions, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse, and her station in the community."

There are numerous other cases reported in this and other states bearing upon the liability of the husband for necessities, but attention has been called to those most nearly in point upon the question involved in this case. There are, however, some cases in England where the question appears to have been more thoroughly considered in the higher courts. In the case of *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394, Bramwell, L. J., in stating the question involved, says: "The goods were necessities in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessities in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them." He then proceeds to state the cases in which the husband would be liable; as, for instance, where he turns his wife out of doors, or conducts himself in such manner as to oblige her to leave him, she may provide herself at his expense, and pledge his credit for necessities, such as food, apparel, lodging, and medicine. In case they are living and cohabiting together, and there has been a custom of contracting short credit as to a class of articles, such as grocery and meat bills, her authority to order the same may be inferred, not for the reason that it springs out of the contract of marriage, but because of her existing relation as the head of his household; that the same authority would be inferred in favor of a sister, or a housekeeper, or other person who presided over the management of his house. The judge concluded by holding that the husband was not liable. The same case was subsequently brought up for review in the House of Lords. L. R. 6 Appeal Cases, 24. Lord Chancellor Selborne then considered two questions. The first was whether the mere fact of marriage implies a mandate by law, making the wife the agent in law of her husband, to bind him by her contract, and to pledge his credit. Upon this point he says that: "According to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity—a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her; but not when the husband and wife are living together, and when the wife is properly maintained, because there is, in that state of circumstances, no *prima facie* evi-

dence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt for the purpose of keeping herself alive or supplying herself with lodging or clothing." The second question considered by the Lord Chancellor was whether the law implied such a mandate from the fact of cohabitation. Upon this point he says: "If, therefore, the law did imply any such mandate from cohabitation, it must be an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities which show that the ordinary state of cohabitation between husband and wife does carry with it some presumption — some *prima facie* evidence — of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do, \* \* \* because in that state of circumstances the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. \* \* \* But where there has been nothing done—nothing consented to by the husband—to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and, though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted, he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *prima facie*, and not absolute; not a presumption of law, but one capable of being rebutted." The Chancellor then proceeds to consider the facts in the case, and concludes by holding the husband not liable, stating that: "It was argued that, because these articles were found to be in some sense necessities in their nature, the husband ought, therefore, to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessities if he made a reasonable allowance to his wife, and duly paid it; much less can he be bound in a case like this, where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing." In the still more recent case of *Morel Brothers and Company Ltd. v. The Earl of Westmoreland*, L. R. 1 K. B. (1903) 64, it was held that the presumption which arises that the husband has given the wife authority to pledge his credit for necessities may be rebutted by proof of an arrangement under

which a substantial allowance has been made by the husband to the wife for household expenses. In this case Mathew, L. J., concludes his opinion by stating: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of agency, and it is incumbent upon them to prove the wife's agency. They can easily protect themselves from any great risk in such cases, but, if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

Schouler on Husband and Wife, § 107, sums up the authorities upon the subject as follows: "Not only is the husband permitted to show that articles in controversy are not such as can be considered necessities, but he may show that he supplied his wife himself, or by other agents, or that he gave her ready money to make the purchase. This is on the principle that the husband has the right to decide from whom and from what place the necessities shall come, and that so long as he has provided necessities in some way, his marital obligation is discharged, whatever may be the method he chooses to adopt. Accordingly, in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessities at his own home he is not liable to provide them elsewhere. In general, while the spouses live together, a husband who supplies his wife with necessities suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction." For further authorities and discussions upon the subject, see 10 Cent. Law J. 341; 54 Cent. L. J. 472, 18 Am. Law Reg. (N. S.) 412-416 (Judge Bennett's note); 20 Am. Law Reg. (N. S.) 324 (Judge Bennett's note); *Clark v. Cox*, 32 Mich. 204.

The discussion of the English cases, to which attention has been called, covers the points involved in this case. They, in effect, hold, in accordance with the charge made by the judge in this case, that the husband, in defense, may show that the wife was amply supplied with articles of the same character as those purchased, or that she had been furnished with ready money with which to pay cash therefor; that the question of her agency is one of fact, and is not a conclusion of law to be drawn alone from the marital relation. The conclusions reached in these cases are in accord with the rule as stated by Schouler and some of the decisions alluded to in this state, and we incline to the view that the rule recognized by them is the safer and better rule to follow. It compels the husband to pay in a

proper case, and at the same time affords him some financial protection against the seductive wiles exerted by tradesmen to induce extravagant wives to purchase that which they really do not need. We do not participate in the alarm which appears to have possessed the learned justices of the Appellate Division on account of the possible inquisitorial examination to which the wives may be subjected. The anxiety of tradesmen to sell will be sufficient to protect them from any improper "inquisitorial examination." If a wife is going to a merchant to trade, with whom she is acquainted, and with whom she has been accustomed to trade upon the credit of her husband, she may still continue to do so until the husband gives notice prohibiting the merchant from longer giving credit to her. But when she goes to a stranger, with whom she has never traded before, and where, consequently, there is no implied authority on the part of the husband to give her credit, and seeks to purchase upon her husband's credit, it is but reasonable and proper that she disclose to the merchant her authority therefor; or for the merchant to request such disclosure.

We have discovered no errors in the rulings of the trial court. The judgment of the Appellate Division should, therefore, be reversed, and that entered upon the verdict affirmed, with costs.

GRAY, VANN, CULLEN, and WERNER, JJ., concur. PARKER, C. J., dissents. MARTIN, J., absent.

Judgment reversed, etc.



## SKINNER v. TIRRELL.

159 MASS. 474.—1893.

MORTON, J. This is a bill in equity, in which the plaintiff, who has advanced money to the defendant's wife while living apart from her husband, which she expended, it is alleged, in the purchase of necessities, seeks to be subrogated to the rights of the persons furnishing the necessities, and prays that the defendant may be ordered to pay to her the amount so advanced. The defendant demurred to the bill. The demurrer was sustained and the bill was dismissed, and the plaintiff appealed.

The demurrer was a general one, and it was claimed at the argument, as one ground of it, that the bill did not set out sufficient facts to show that the wife was living apart from her husband for justifiable cause. Without considering whether this objection was well taken, we assume that, if valid, it could be removed by amendment. The question then is whether the bill, if amended so as to remove this objection, can be maintained either on the ground of subrogation or on the ground of a general equity. We think it cannot stand on either.

There can be no subrogation unless there is something to be subrogated to. A debt or liability cannot be created where none existed for the purpose of effecting a substitution. There never was any liability on the part of the defendant to the parties who furnished the wife with the necessities. The goods were sold to her and were paid for by her. They were not furnished on the defendant's credit, but on the wife's. The money that was advanced by the plaintiff was not advanced to the parties who furnished the necessities, but to the wife, to be expended by her as she saw fit. There is no ground, therefore, for the application of the doctrine of subrogation. Although the right of subrogation does not depend on the contract, but rests on natural justice and equity, there must be either an agreement, express or implied, to subrogate, or some obligation, interest, or right, legal or equitable, on the part of the party making the payment or advance in respect of the matter concerning which payment is made or money advanced, in order to entitle him to subrogation. *Hart v. Western Railroad*, 13 Met. 99; *Amory v. Lowell*, 1 Allen, 504; *Wall v. Mason*, 102 Mass. 313; *Ætna Ins. Co. v. Middleport*, 124 U. S. 534; *Gans v. Thieme*, 93 N. Y. 225, 232; *Arnold v. Green*, 116 N. Y. 566; *Nolte v. Creditors*, 7 Mart. (N. S.), La. 602; *Johnson v. Barrett*, 117 Ind. 551; *McNeil v. Miller*, 29 W. Va. 480; *Miller's Appeal*, 119 Pa. St. 620; *Suppiger v. Garrels*, 20

Bradw. (Ill.), 625; *Gadsden v. Brown*, Speer's Eq. 37, 41; *De Concilio v. Brownrigg*, 25 Atl. Rep. 383; *Brewer v. Nash*, 16 R. I. 458, 462; *Blackburn Building Society v. Cunliffe*, 22 Ch. D. 61; *Stevens v. King*, 84 Me. 291; Sheldon on Subrogation, secs. 2, 3, 240.

A mere volunteer is not entitled to subrogation. *Ætna Ins. Co. v. Middleport*, *Arnold v. Green*, and *Gadsden v. Brown*, *ubi supra*; Sheldon on Subrogation, secs. 241, 242, and cases cited. Nor is one who lends money to another to pay a debt entitled as a matter of right to stand in the creditor's shoes. Sheldon on Subrogation, secs. 241, 242, and cases cited. So far as subrogation is concerned, the plaintiff's contention resolves itself into the proposition that the defendant's wife could have bought on her husband's credit the necessities which she purchased and paid for with the money advanced to her by the plaintiff; that if the plaintiff had paid the parties supplying the necessities their several demands, she would have been entitled to be subrogated to their claims against the defendant; and that, therefore, a decree should be entered in her favor against the defendant in this suit. If the premises are correct, manifestly this conclusion does not follow from them.

There are ancient and modern cases in England which hold that a person advancing money to a married woman under circumstances like those in this case can recover the same of the husband in equity. *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pitfeild*, 1 P. Wms. 558; *Deare v. Soutten*, L. R. 9 Eq. 151; *Fenner v. Morris*, 3 DeG. F. & J. 45; see, also, *In re Wood*, 1 DeG., J. & S. 465.

These cases have been followed in this country in Connecticut (*Kenyon v. Farris*, 47 Conn. 510),<sup>1</sup> and there is a dictum in a case in Pennsylvania. *Walker v. Simpson*, 7 Watts. & Sergt. 83. To the same effect, certain text-writers, also following the English cases, have stated the law to be as there held. 1 Bish. Mar. Div. & Sep. secs. 1190, 1191; Pom. Eq. Jur. secs. 1299, 1300; 2 Kent, Com. 146, note; Schouler, Domestic Relations, sec. 61, note.

But those cases do not appear to us to rest on any satisfactory principle. It was apparently conceded by the Lord Chancellor in *Fenner v. Morris*, *supra*, that they did not. He seems to have yielded to them simply as precedents which he was bound to follow. The earliest one, *Harris v. Lee*, on which the subsequent ones rely, referred the jurisdiction, without much discussion or consideration of it, to the principle of subrogation. For reasons already given, we think that principle inapplicable. It is said that equity has jurisdiction, because there is no remedy at law. It is admitted that there is none at law. But it is contended that the defendant was bound to furnish his wife with necessities; that the money which

<sup>1</sup> And in *Lueppie v. Osborn*, 52 N. J. Eq. 637.

the plaintiff advanced to her was actually expended in good faith by her for necessities; that it will be no hardship upon the defendant to be obliged to pay for necessities which the law would have compelled him to furnish; and that in the interests of justice equity should compel him to pay the plaintiff the sums which she has advanced. In effect, this is the same as saying that in equity money advanced to a wife living separate from her husband and for justifiable cause, and expended by her in good faith in the purchase of necessities, should itself be regarded as necessities and recoverable accordingly. At law it is clear that money is not necessities, and that a married woman living separate from her husband cannot borrow money on his credit to purchase necessities. What is necessities must be the same in equity as at law. It cannot be one thing on one side of the court and another thing on the other. There may be strong reasons why married women, compelled by their husbands' misconduct to live apart from them, should be allowed to borrow money on their husband's credit for the purchase of necessities. It is for the Legislature, if it deems it advisable, to give them such power. In this State they are not without a remedy in such cases. The Probate Court may, upon their petition, order the husband to pay to them from time to time such sums of money as it deems expedient for their support. Pub. Sts., c. 147, secs. 33 *et seq.* It is possible that this statute should be taken as a declaration of the legislative sense that a married woman living apart from her husband should obtain money for necessities through the aid of the Probate Court, and not by pledging his credit. However that may be, a majority of the court can discover no satisfactory ground on which jurisdiction in equity of the present suit can rest.

Decree affirmed.

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*Wife's Ante-nuptial Contracts with her Husband.*

PIERCE *v.* PIERCE.

71 N. Y. 154—1877.

MILLER, J. Upon the accounting of Mrs. Pierce, as administratrix of her deceased husband's estate, before the surrogate, it was held that the ante-nuptial agreement entered into at the time of their marriage was valid and in full force, and for that reason she was not entitled to a share, as his widow, in the distribution of his estate, and was only allowed the amount named in said agreement. The agreement referred to purported to have been entered into in con-

templation of marriage, and for the purpose of making provision for a fit and proper settlement by the deceased, for the benefit of his intended wife, and thereby the deceased agreed that if the marriage was had and solemnized, he would, in case she survived him, pay or cause to be paid to her, the sum of \$500 for her sole and separate use; and she agreed, in consideration of the "money paid to her," that said money should be in full satisfaction of her dower, and bar her from claiming the same, or any share of his personal property, unless given to her.

We are of the opinion that the contract in question cannot be upheld, for the reason that the evidence establishes, beyond any controversy, that it was executed by the respondent, under a belief — which was created by the conduct and declarations of the deceased — that it contained more beneficial provisions in her favor than were contained in the same, and that the deceased, taking advantage of the confidential relationship existing between him and the respondent, who was the intended wife of the deceased, he was chargeable with fraud and misrepresentation in procuring her signature to the same.

Ante-nuptial contracts, whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition, they will be enforced by the courts. The surrender and release of rights to be acquired by the intended wife by the marriage relation must, however, be regarded with the most rigid scrutiny; and courts will not enforce contracts of this nature against the wife where the circumstances establish that she has been over-reached and deceived, or been induced by false representations to enter into a contract which does not express or carry out the real intention of the parties. The relationship of parties who are about to enter into the marriage state is one of mutual confidence, and far different from that of those who are dealing with each other at arm's length. This is especially the case on the part of the woman; and it is the duty of each to be frank and unreserved when about to enter into an ante-nuptial contract, by a full disclosure of all facts and circumstances which may in any way affect the agreement. *Kline v. Kline*, 57 Pa. 120.

In the case cited, which involved the validity of a marriage contract, it was held there was error in the charge of the judge to the jury that the woman was bound to exercise her judgment, and take advantage of the opportunity that existed to obtain information — if she did not do so, it was her fault; and that the parties were dealing at arm's length. See, also, case of *Kline's Estate*, 64 Pa. 122,



which holds that parties to such a contract occupy a confidential relation; and *Tarbell v. Tarbell*, 10 Allen, 278; *Fay v. Rickman*, 1 N. C. (Bush Eq.), 278; *Woodward v. Woodward*, 5 Sneed. 49. These authorities go very far in holding that the courts require strict proof of fairness, when called upon to enforce an ante-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust, and unreasonably disproportionate to the means of the husband. The rule undoubtedly is, that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement. It is also a well-settled principle that a court of equity will interpose its power to set aside an instrument executed between parties who stand in confidential relations, when there is evidence showing fraud, or even when it appears that undue influence has been exercised, when one party is so situated as to exercise a controlling influence over the will, conduct, and interests of the other. *Sears v. Shafer*, 6 N. Y. 268; *Nesbit v. Lockman*, 34 id. 167. So, also, when one party is intrusted to reduce a contract to writing, he is bound to do so faithfully and truly; and any variation from it, by omitting some of its terms, or by inserting provisions not embraced in it, if not known to the other party and distinctly assented to by him, is a clear fraud. *Botsford v. McLean*, 45 Barb. 478-488, and authorities cited. While parties to a written agreement should look out for themselves, and ordinarily the written contract is presumed to express their common intention, yet, when one occupies a confidential relationship to the other, and was intrusted with reducing it to writing, and it is clearly made to appear that the written contract was untrue, and misrepresents and misstates the real intention as understood and agreed upon, it cannot stand. More especially is this rule applicable when undue advantage has been taken, and a fraud perpetrated. Within the rules referred to, a case is made out by the evidence which establishes that the alleged ante-nuptial agreement was nugatory and void. The testimony is uncontradicted and unimpeached, that when the respondent signed the contract, she acted under a belief and conviction that she was thereby to receive the sum of \$500 in cash, a deed of a house and lot, and \$500 if she survived the deceased. The contract was stated or read to the respondent as containing those provisions, before the proposed marriage; and when it was assented to by her, at the time when the contract was finally executed, the deceased stated to the clergyman who performed the marriage ceremony, and witnessed the written agreement, that it was

unnecessary for him to read it — intimating that the contents were known and understood. It was not read at that time, nor does it appear distinctly that it was ever read by the respondent at any time. It is also proved that after the marriage, on one occasion, the deceased asked the respondent if she did not wish she had the contract, and she replied it was not good for anything, unless he paid her the \$500 he had agreed to. And in the summer of 1860, the respondent stated to the deceased that he had agreed to give her the house and lot, and asked him why he did not do it; and he replied, that perhaps she should have the house he lived in, or to that effect. It thus appeared that he acquiesced in the statement made as to the contents of the contract, and did not deny that it contained the provisions claimed by her. The proof referred to shows that he kept it all the time in his own possession, or under his own control; and when called upon to fulfill his engagement, he failed to deny the statements as to the agreement actually made, and virtually admitted that they were correct.

It is plain that the respondent understood the contract as containing the provisions stated by the deceased, and that the deceased understood that such was her belief as to its contents. He permitted her to act on this hypothesis, and while laboring under an entire mistake, without correcting it, and it does not rest with his heirs now to claim that it was otherwise than the deceased stated and the respondent understood at the time. She married him under such a belief, and he having knowledge that such was her understanding of the agreement, those who represent him are estopped now from insisting that the contract was valid and should be enforced.

For the reasons stated, the alleged contract was invalid and void, and the General Term very properly modified the decree of the surrogate by allowing the respondent a distributive share, as widow, in the estate of the deceased.

No other question raised demands comment, and the judgment of the General Term should be affirmed, with costs.

All concur, except Rapallo, J., absent.

Judgment affirmed.

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### FARLEY v. FARLEY.

91 Ky. 497.—1891.

JUDGE BENNETT delivered the opinion of the court.

The appellant, while a *feme sole*, executed to the appellee the notes, and the mortgage on her land to secure one of the notes, now in controversy. She and the appellee thereafter married each

other, and while they were husband and wife, and said notes not having been paid, the appellee brought suit on them, seeking a personal judgment and foreclosure of said mortgage.

The appellant interposed the defense that by her marriage with the appellee said debts were, in law, paid, or extinguished, which had the effect to cancel said mortgage. During the pendency of this suit the appellee obtained a divorce from the appellant, in which each party was restored to any property not disposed of at the commencement of the action, which such party might have obtained, directly or indirectly, from or through the other, etc.

The lower court decided that the subsequent marriage, under the circumstances did not extinguish the said mortgage, and ordered the land sold to pay the mortgage debt.

By the common law, marriage has the legal effect of paying or extinguishing the debt that the husband might owe the wife, or the wife the husband, at the time of the marriage. By that law the husband, by the marriage, became responsible for the debts due by the wife at the time, and became bound to provide for her comfort and maintenance during coverture, and, in return, all her personal estate, of whatever description, became absolutely his. If she, at the time of marriage, held a note on him, the note was, in law, paid; it became his. If he held a note on her, it, in law, was paid or extinguished by the marriage. If, at the time, she was indebted to him, say one thousand dollars, and possessed say one hundred thousand dollars, the law gave him said sum, and at the same time paid her debt to him. If she took one thousand dollars of this sum and paid the debt, she would take what already belonged to the husband by virtue of the marriage. Suppose she were to say to the husband, you got ten thousand dollars by me, which ought to pay this debt, would he be permitted to say that he got what the law gave him, and as she owned a tract of land which the law did not give him, except the rent and use, he would subject that to the payment of the debt? Surely a court of equity would not allow this. Surely it would say to him, as the law gave him, upon the marriage, all the personal estate then owned or thereafter acquired by this woman, it also paid or extinguished her indebtedness to him. It would say to him still more specifically, it is the right, without reference to the quantity received, to her personal estate and her earnings that pays or extinguishes her indebtedness to him.

Now, this common-law rule prevails in this State, except as it is modified by statute, which modification consists in the wife's retaining the legal title to her real estate, and the husband's non-liability for the payment of any ante-nuptial debts of hers, except to the extent

that he received personal estate from her by reason of the marriage. This non-liability is more favorable to him than was the common-law rule, which was intended to establish equality, in view of the fact that the statute allows her to retain the title to her real estate; but it does not have the effect not to pay any debt that she might owe him, because he is yet entitled to all her personal estate, time, labor and earnings, which should have the legal effect of paying or extinguishing her indebtedness to him. She could still say to him that the thousands of dollars that were once hers, and out of which she could have paid the debt, were now his, and her earnings, once hers, and out of which she could have paid the debt, were now his, and she, consequently, had nothing with which to pay. But he says, you have land, pay me out of that; but she says you control the rents and income from that land, and if I offer you that, you will tell me that you are entitled to that by law. Yes, of course, give me the title; you have that left. But, instead the common law says that it is the acquisition by the husband of this right, although never substantially realized, that pays the wife's indebtedness to the husband, and the reason of the rule exists notwithstanding our statutory modifications. This common-law rule as to payment does not obtain where the ante-nuptial contract was not to be enforced during coverture, or where the wife, by either contract or the law, retains all her estate as a separate estate; then, in that case, the reason ceases, and equity will relieve against the rule. But such is not the case here; the modifications suggested do not change the essence of the reason, consequently the rule obtains and said indebtedness was, in law, paid.

But it is said that the mortgage gave the appellee an equity which he could enforce after the marriage. Well, the mortgage did not convey to the appellee any equity except as that equity was supported by the debt that the equitable conveyance was intended to secure; and if such debt was thereafter paid in fact, or by operation of law, the lien or equity became *eo instante* discharged. Such lien subsists upon the debt that it secures; and when that debt is paid, or extinguished by either actual payment or payment by operation of law, the lien itself is thereby discharged.

But it is said the divorce restored each party to all his property not disposed of before the commencement of the action as fully as if there had been no marriage. The answer to this proposition is, that the appellee's property in these notes was disposed of before the action was commenced. They were paid, or extinguished, by the marriage, and the divorce did not revive them.

The judgment is reversed, with directions to dismiss the appellee's petition.



*Wife's Post-nuptial Contracts with her Husband.*

## SPOONER v. SPOONER.

155 MASS. 52.—1891.

APPEAL from a decree of the Probate Court dismissing the petition of Susan G. Spooner, as administratrix of the estate of her late husband Walter Spooner, for a license to sell real estate for the payment of debts. The case was heard by Knowlton, J., who reported it for the consideration of the full court, in substance as follows:

It appeared that the appellant advanced from her separate estate to her husband in his lifetime the sum of \$1,075, and took in return therefor a note signed by her husband and payable to the order of Walter R. Spooner, and by him indorsed to the appellant in the lifetime of the husband. The note was indorsed at the time when it was made, and after being indorsed was delivered to the appellant. It was never in the possession of the payee except for his indorsement, and was delivered to the appellant by the husband. The note and indorsement (except the signature of payee) was in the handwriting of the husband. There was no indebtedness of the estate except said note, and if this note should be paid it is necessary to sell a part of the real estate, and the petition should be granted.

ALLEN, J. It has often been held that a promissory note running directly from a husband to his wife, or *vice versa*, is void, and cannot be made valid by a transfer to a third person. *Woodward v. Spurr*, 141 Mass. 283, and cases there cited. But where a note given by a husband to a third person is valid in its inception, it does not become a nullity by being transferred to the wife, though she may not be able to maintain an action against him upon it in her own name. Thus, in *Butler v. Ives*, 139 Mass. 202, a wife borrowed money from her husband and made a note secured by mortgage therefor to a third person for her husband's benefit, and it was held that the note and mortgage were not extinguished by being subsequently assigned to the husband, though he could not enforce them by proceedings at law in his own name, and that the right to enforce them revived when they were transferred by him to a third person. See, also, *Degnan v. Farr*, 126 Mass. 297. In each of these last two cases the original transaction was a loan of money between husband and wife, and in each a note and mortgage were given to a third person for the purpose of securing the repayment of the loan. In each case it was considered that the note was valid in its inception, so that it might have been sued in the name of the payee for

the lender's benefit. The circumstance that a third person was introduced as payee, merely for the purpose of avoiding the objection that husband and wife cannot contract directly with each other, did not render the note invalid. The present case falls within the doctrine thus established. The payee might have maintained an action upon the note. The consideration was sufficient. *Atlantic Bank v. Tavenor*, 130 Mass. 407; *Nichols v. Nichols*, 136 Mass. 256. His title was, in substantial particulars, like what existed in *Degnan v. Farr* and *Butler v. Ives*, above cited. If Mrs. Spooner, after taking the note, had transferred it to a third person, such third person could have maintained an action upon it. Such transfer might be made now. But since her husband is dead, formal objection to proceedings in her own name has ceased; the note is a valid indebtedness against his estate, and she, as administratrix, may maintain her petition for license to sell real estate to raise money for its payment.

Decree reversed.

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### CAREY *v.* MACKEY.

82 MAINE, 516.—1890.

#### ON REPORT.

This was an action of debt on the bond of the defendant, made and given to the plaintiff, then his wife, September 12, 1882, for her separate support. Besides a general count in the declaration for the penal sum of the bond, the plaintiff also declared for forty-five monthly payments of thirty dollars each.

April 13, 1883, a divorce *a vinculo* with a decree for a gross sum of \$690.00, as alimony, and the right to resume her maiden name, was granted to the plaintiff, by the court in Florida, where both parties had their domicile.

PETERS, C. J. The plaintiff declares on the instrument adduced below, as a penal bond, and also upon the covenants expressed in it:—"This agreement made this twelfth day of September, 1882, between Jonathan I. Mackey and Alicia C. Mackey, both of Florida, and residents of Jacksonville in said Florida, witnesseth that, whereas my wife, Alicia C. Mackey, has this day expressed her desire to me that a separation of relations of man and wife between ourselves might be effected, and for good reasons known to herself, be it known that I hereby consent to said separation, and, in consideration of my duty to her as her husband, I hereby agree to pay to her monthly, through the Hon. M. A. McLain of Jacksonville

aforesaid, the sum of thirty dollars per month, on the first day of each month, the first installment or payment being and to become due November 1, 1882. And I hereby bind myself to the well and true payment of thirty dollars aforesaid monthly, so long as she shall maintain good behavior and shall (not) have remarried, and this I bind myself to do under a penalty of five thousand dollars, to be recovered by her in any court of law by attachment upon my property and of myself, which sum of five thousand dollars aforesaid I hereby agree shall be considered a forfeiture upon my part to her. And this thirty dollars per month is in addition to the one hundred and fifty dollars which I have already paid her at the making of this agreement. And this I do freely and understandingly.

"Witness my hand and seal this 12th September, 1882.

J. I. MACKEY, (seal)."

The instrument was acknowledged before H. M. Sylvester, a notary public, and witnessed by him.

The plaintiff cannot recover on both forms of declaration.

She elects to recover the penal sum. We have no doubt the instrument declared on is a penal bond. It contains all the elements of one, though perhaps not expertly put together.

"If I by deed, covenant or promise to do a thing, and then say to perform which promise I bind myself in twenty pounds, this is a good obligation in law." No set form of words is necessary, as see numerous illustrations in Bacon's and Dane's Abridgements; Title, Obligation. We are of opinion that the five thousand dollars are a penalty and not liquidated damages.

Passing the points made on the pleadings, an important question arises whether an agreement for separate support is valid in this State. We do not see why not. It is said in argument that there has never been a judicial decision in the State touching the question. That indicates that the danger of a frequency of such cases must be small indeed.

Certainly such an agreement comes within the spirit of our late statute which provided for a divorce from bed and board, the marital tie remaining. There never has been any judicial expression in this State against an agreement for separate support. The doctrine is upheld in an early Massachusetts case when this State was a part of that commonwealth, and the precedent is, therefore, as binding here as it is there.

In *Page v. Trufant*, 2 Mass. 159, decided in 1806, it was held that "a bond from the husband to the father of the wife for her maintenance, after a voluntary separation, is a valid contract."

According to the practice of that day, each judge sitting expressed his opinion on the question, and all favored the doctrine. Parsons, C. J., closed the discussion in these words: "It in fact appears on the record that the consideration was legal and meritorious, as it was made to secure a separate maintenance for the wife, who separated from her husband for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them."

In *Fox v. Davis*, 113 Mass. 255, the doctrine is fully recognized, and was applied in that case. Mr. Bishop, in 1 Bish. Mar. & Div. (6th ed.), book 5, ch. 39, enumerates the states, citing their cases, where the doctrine is either allowed or disallowed; and it appears to have been accepted by most of the states. In England it is established by act of Parliament. The condition on which it rests is that separation has already taken place, or that the agreement is made in contemplation of an immediate separation which takes place as contemplated.

The only objection to such contracts is the encouragement which may be afforded for married parties to separate from each other. We think that amounts to little or nothing under our liberal divorce system. Parties greatly prefer divorce and alimony to mere separation.

There may be a distinction to be observed. Some contracts of separation might offend public policy, and others not. Certainly there are cases where a wife would be justified in separating from her husband, and asking a support from him notwithstanding the separation. There was undoubtedly good cause for separation in the present case. The evidence in the divorce case, to be alluded to hereinafter, which is a part of the record of this case, shows that the separation was caused by cruelties inflicted by him upon her. He had frequently choked her severely, and habitually abused her in different ways. She proves that she has been a person of good behavior since separation, as the contract requires of her, and that she has not married again.

\* \* \* \* \*

It is contended for the defendant that the agreement for separate support was terminated by the divorce obtained by the plaintiff in a court in Florida in 1883. The agreement does not provide for its rescission or termination upon the wife's divorce. A failure of good behavior or re-marriage are the only causes provided for its termination. The promised support would be just as much needed after divorce as before. There is no agreement of parties in the provisions of the divorce, nor was there any in the negotiations preceding divorce, that the contract should be annulled thereby, although



the defendant attempted to prove such an understanding. The court could have imposed such condition, a not uncommon thing, but failed to do so. Nor does the decree of divorce, of its own force, have the effect of terminating the prior agreement for separate support. On this point the doctrine is stated by Mr. Bishop, and the authorities fully cited. 1 Mar. & Div. (6th ed.), sec. 637; 2 same, secs. 55, 717-722, 741.

The counsel for defendant argue at great length that an action cannot be maintained on the agreement because not of legal form in all respects, very properly contending that all contracts made between husband and wife do not become valid merely because the marital tie has been sundered by a decree of divorce. But all contracts of the kind which equity would uphold before divorce, the law recognizes after divorce.

This agreement is substantially a legal agreement, and at all events a good equitable agreement. Had the promise in it been made to this plaintiff's agent as her trustee, it would have been a perfectly formal instrument at law. But the promise is to her, though the delivery of the money was to be to the agent for her. Equity would have readily supplied formality.

In the divorce proceedings the plaintiff received allowances towards her support of \$690.00, the terms of divorce having been arranged by the counsel of the parties. Here, then, was a decree of court for support, and also an agreement of parties for the same purpose. It does not clearly appear what was in the minds of the parties about a double allowance, but from what was said and done in the negotiation, and because there would be much apparent justice in thus interpreting the transaction, we think we are justified in concluding that it was the tacit understanding of the parties that the allowances, in the divorce suit, should be a credit to that extent upon the amounts payable by the contract. *Albee v. Wyman*, 10 Gray, 222.

The result must be that judgment is to be entered for the penal sum of the bond, execution to issue for the sum due on the bond less the credit of six hundred and ninety dollars.

Defendant defaulted for the penal sum.

Damages to be assessed at *nisi prius*.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

[DOMESTIC RELATIONS—8.]

MCGREGOR *v.* MCGREGOR.

20 Q. B. D. 529.—1888.

The plaintiff and defendant, who were wife and husband, took out cross-summonses against each other for assaults, but before the hearing a verbal agreement was entered into by them by which the summonses were to be withdrawn, and the plaintiff and defendant were to live separate, the defendant agreeing to pay the plaintiff £1 a week for the maintenance of herself and children, and the plaintiff agreeing to indemnify the defendant against any debts which she might contract. The defendant, the husband, having failed to pay the weekly allowance, the wife issued a plaint against him for £6, being six weeks' arrears of the agreed weekly sum for maintenance. The learned County Court gave judgment for the plaintiff. The defendant appealed.

A. L. SMITH, J. This was an action brought in the County Court of Newcastle-upon-Tyne to recover £6, being six weeks' arrears of maintenance contracted by a husband to be paid to his wife under the following circumstances:

The plaintiff and defendant before and at the time of the contract hereafter referred to were and still are husband and wife. On several occasions prior to the month of June, 1886, the defendant's ill-usage had obliged the plaintiff to apply to the police for protection against her husband, and in the month of June, 1886, she was compelled to take out a summons against him for assault. The defendant thereupon took out a cross-summons against the plaintiff. On July 1, 1886, when the summonses were about to come on for hearing at the police court, negotiations took place between the respective solicitors of the plaintiff and defendant, and it was thereupon agreed between the plaintiff and the defendant "that they should live separate and apart; that the defendant should pay to the plaintiff £1 per week, and that she should therewith maintain herself and her three children; that she should indemnify her husband against any debts contracted by her; and, further, that the summonses should be withdrawn." The above are the findings of the County Court judge. He also found that nothing had occurred to rescind or affect the agreement, and, as we understand, that the plaintiff had done all things on her part to entitle her to have it carried out and performed by the defendant. So matters stood when the present action was brought. The County Court judge gave judgment for the plaintiff, and the defendant appealed.

It was contended by Mr. Walton, on the defendant's behalf, that notwithstanding the contract existing as found by the judge, no action was maintainable by the wife against the husband thereon, and that at any rate in an ordinary action in the County Court upon the agreement, as this was, no relief could be given to the wife. He said that the husband and wife being one, no contract could be entered into between them, and consequently that the one could not sue the other upon an alleged breach of what could not exist, that it was impossible for parties standing in the relation of husband and wife to contract without the intervention of a trustee, and that even if he was wrong in the above, the Statute of Frauds was an answer to the case, the contract being one not to be performed within the space of one year from the making thereof. The County Court judge came to the conclusion that by reason of the Married Women's Property Act, 1882 (45 and 46 Vict. c. 75), the plaintiff was entitled to contract as she did with the defendant. It should be pointed out that he came to this conclusion before the case of *Palliser v. Gurney*, 19 Q. B. D. 519, was reported. We are unable to agree with the County Court judge in holding that the Married Women's Property Act, 1882, gave the power to the wife to contract with the husband as she did in this case, and we are of opinion that it did not; but the question still remains whether, under the circumstances found to exist in the present case, the husband and wife had not the power to contract as they did.

It seems to us to be now too late to argue, as it was argued before us, that a husband and wife, in consideration of not taking proceedings, the one against the other, for matrimonial offences, cannot contract to live separate and apart, and that the courts will not grant relief when such a contract is in fact made. In our judgment the law is that when circumstances exist between husband and wife which would or which might give rise to proceedings by way of suit for matrimonial offences, it is competent in consideration of the one not taking such proceedings against the other for the two to contract to live separate and apart, and that the courts will enforce the stipulations of such a contract when made. In the case of *Wilson v. Wilson*, 1 H. L. C. 538, the House of Lords decided that a deed of separation between husband and wife was not against public policy, whatever might have been argued upon this point prior to that decision. In *Hunt v. Hunt*, 4 D. F. and J. 221, Lord Westbury, it would seem, thought that a husband and wife under the circumstances above mentioned could contract, and that such contract ought to be enforceable by the one against the other. The president of the Probate Division, Sir James Hannen, in *Marshall v. Marshall*,

5 P. D. 19, so held, as did the late Master of the Rolls, Sir George Jessel, in *Besant v. Wood*, 12 Ch. D. 605.

It seems to us that the power of the husband and wife to contract under the circumstances existing in the present case is settled by judicial authority, and the reasons for so holding are so cogently pointed out by Sir George Jessel in *Besant v. Wood*, 12 Ch. D. at pp. 621 and 622, that we do not extract or recapitulate them, but adopt them in this judgment. It follows from the above that the point taken that there is no trustee with whom the husband and wife may respectively contract will not avail the defendant, and that the passage from Story's Equity Jurisprudence, sec. 1428, and the decision of Lord Eldon in *Legard v. Johnson*, 3 Ves. 352, are not applicable to cases like the present.

We wish also to point out that in *Rowley v. Rowley*, Law Rep. 1 H. L., Sc. 63, there was merely, as it appears, an agreement between husband and wife, who were then parties to divorce proceedings, to compromise the suit upon terms. The House of Lords held such to be a valid binding agreement between the parties, and gave effect to its provisions. There was no trustee or anything of the sort in the case. If, then, an agreement between husband and wife to compromise a suit is valid and binding, why, we would ask, is not an agreement to live separate and apart without bringing the suit to be valid and binding, the consideration being the existence of facts which would give jurisdiction to the court? In our opinion it is, and such consideration existed in the present case, namely, a charge of cruelty against the husband.

As to the point taken that this was an ordinary County Court action, and not a proceeding upon the equity side of the court, it should be noticed that the effect of secs. 24 and 25 of the Judicature Act, 1873, and secs. 89, 90 and 91 of the same act, are such as to give power to the County Court to grant relief, even though the action in form is a common law action for debt, in as ample a manner as if it had been an action in the Superior Court.

Now as to the Statute of Frauds. Various cases were cited in argument upon the one side and the other as to whether this agreement was or was not within the statute as being an agreement "not to be performed within the space of one year from the making thereof." The County Court judge held it not to be within the statute. But, be this as it may, it seems to us that inasmuch as this is an action to recover six weeks' arrears of maintenance, the plaintiff is entitled to recover as for money paid at defendant's request, the consideration being executed, and that this point was expressly decided in plaintiff's favor in the case of *Knowlman v.*



*Bluett*, Law Rep. 9 Ex. 307, in the Exchequer Chamber, which is really undistinguishable from the present case.

For the reasons above we give judgment for the respondent and with costs.

Appeal dismissed.<sup>1</sup>

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<sup>1</sup>For an elaborate and extended historical review and discussion of the English and American cases upon contracts of separation see the opinion of PEASLEE, J., in *Foot v. Nickerson*, 70 N. H. 496, and an article by him on "Separation Agreements under the English Law," in 15 *Harvard Law Review*, 638.

*Wife's Chattels Personal.*CAFFEY *v.* KELLEY.

BUSBEE'S EQ. (N. C.) 48.—1852.

JAMES MCNEELY died intestate in the early part of the year 1849, leaving surviving him a widow, the *feme* defendant, since intermarried with the other defendant, and two children, the *feme* plaintiffs. His widow administered on his estate, and this bill is filed for a settlement of her accounts as administratrix.

At the time of the defendant Isabella's marriage with her *intestate* she owned an undivided half of two slaves (Sarah, aged about five years, and Thompson, about five months), as a tenant in common with her brother, William Mitchell, which slaves they had acquired by gift from their father; and she and her then husband went to live with her mother, Mrs. Mitchell, in whose possession were the said slaves, as well also a quantity of furniture belonging to the defendant Isabella. Whilst living with Mrs. Mitchell, it does not appear that the intestate ever exercised any positive acts of ownership over the said slaves, nor that he set up any claim to them by virtue of his marriage; but they were simply understood in the family to be the property of the said Isabella and William as tenants in common. Nor does it appear that he asserted any ownership or control over the furniture there, which was his wife's. The intestate died within about three months after his marriage — having a short time before his death removed to a house of his own; and on removing, he did not carry with him the said slaves, or either of them, nor the said furniture. The bill alleges that the defendant's intestate, by virtue of his marriage, and acts of ownership exercised by him over the said property, acquired title thereto; and prays that the defendants may be held to account for the same as part of his estate, which had not been done by them in their inventory and accounts rendered.

BATTLE, J. There can be no doubt that the negro girl Sarah and the boy Thompson became the property of the defendant Isabella's intestate by his intermarriage with her. They were at the house of the said defendant's mother, with whom she lived at the time of her marriage, were not claimed adversely by her mother or any other person, and, therefore, became the property of her husband *jure marito*, whether he ever took them home or not. The two cases of *Pettijohn v. Beasley*, 4 Dev. Rep. 512, and *Stephens v. Doak*, 2 Ire. Eq. Rep. 348, cited by the plaintiff's counsel, show that the wife's being

tenant in common with another person, of the said slaves, made no difference. The household furniture which the said Isabella had at her mother's, at the time of her said marriage, became also the property of her husband, for which she, as his administratrix, is bound to account as part of his estate. But the notes which she held, payable to herself, having never been collected by her husband, survived to her; and it is now admitted by the plaintiff's counsel that she is not bound to account for them.

The plaintiffs are entitled to an account from the defendants of the administration of the estate of the intestate by the defendant Isabella, for which a reference must be made to the clerk, if the parties desire it.

*Per Curiam.* Decreed accordingly.

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*Wife's Paraphernalia.*

HOWARD *v.* MENIFEE.

5 PIKE (ARK.), 668.—1845.

TROVER. Mary E. Menifee, widow, sued Howard, Mason, and Menifee, administrators of Nimrod Menifee, deceased. The declaration contained but one count, for a gold watch, and one Durham cow and calf. The following facts are agreed upon by the parties, and submitted to the court sitting as a jury—to wit: That the plaintiff and the deceased were married in the spring of 1840; and before marriage she was possessed in her own right of a gold watch, worth \$150. After marriage, at request of her husband, she gave away the watch to her sister, and received therefor, from her husband, the watch in question, which she received and retained as part of her paraphernalia until after his decease, in January, 1842. That after her marriage she received as a present the Durham cow, to be held as her own property. The cow brought forth the aforesaid calf, in the lifetime of the deceased, and both remained in her possession as her own property, until after the husband's death. The cow was taken possession of by the plaintiff in Kentucky. After death of husband, administration granted defendants in due form of law in said county; who proceeded to administer, and took possession of said property before suit brought—demand made and refusal.

That the watch is worth \$150; the cow \$200; and the calf \$100. And the defendant still refuses to give them up to her.

That at the time deceased gave the watch, he was possessed of

property worth \$25,000. That when the defendants took the goods, it was uncertain whether the estate was solvent or not.

That the plaintiff was possessed of the goods sued for when taken by defendants, and she was in the possession, and used the watch from its first coming to her until taken by defendants. On these facts the court found for the widow.

SEBASTIAN, J. \* \* \* By the common law, the husband becomes entitled absolutely to all the wife's personal estate, by marriage, and acquired the absolute dominion and right of disposing of it. This was the consequence of the destruction of the separate legal existence of the wife by marriage, by which her rights, capacity, and will was henceforth represented by her husband. His right was the same to any acquisitions of the wife after marriage, which enured to his benefit, and to which his assent was presumed. Unquestionably therefore, the property sued for must be considered at law as belonging to the husband in his lifetime. There is, however, a qualification of the power of the husband over such property of his wife as is denominated her paraphernalia. This was something over and in addition to dower at common law, or the widow's "reasonable part" of the personal estate of the husband, and consisted of such jewels, articles of luxury, or of personal ornament and decoration as were used by the wife and suitable to her condition. Though the husband could dispose of them in his lifetime, he could not alienate them at his death. 1 Peere Williams, 730. The right of the widow to that portion of the estate was absolute and exclusive, except as to creditors. She took it as against the heir or legatee, and in the order of paying the debts of the estate, the personal and then the real estate was applied. For this purpose she might have the assets marshaled in a court of equity, in exoneration of her paraphernalia, or to reimburse the value when it had been subjected. *Grulson v. Corbett*, 3 Atkins, 370; *Tipping v. Tipping*, 1 Peere Williams, 729; 2 Peere Williams, 542. From these and many other cases it is evident that the widow's paraphernalia could be subjected by the creditors and that if subjected, equity gave her a claim of reimbursement from the personalty and real estate. The right of the administrators to subject the gold watch as assets for the payment of debts cannot be questioned. Considering the facts of the case, it was certainly paraphernalia, and this question is one of which the court is to judge. A watch worn by the widow has been so expressly considered. 2 Eq. Cas. Abr. 156. Her remedy is in equity for the value, should there be assets after the payment of the debts, and no action can be maintained in the present form.

Her claim for the value of the other property mentioned rests



upon a different ground. Although it legally vested in the husband, yet, as it was the gift to the wife from a stranger, it is presumed to have been for her separate use, and equity regards it as her separate property and upholds the gift by making the husband trustee. In this case it is clear, from well settled principles, that the property passed to the administrator, clothed with the trust, and he is liable in equity for the value. An action at law in this form cannot be maintained. The legal title would protect him from damages for a conversion, and as the administrator took, not for the creditors, but for the widow, he is to be considered as a trustee for her, and liable for the value of the property converted, when the proper remedy shall be resorted to.

Judgment reversed.<sup>1</sup>

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*Wife's Choses in Action.*

BOOZER *v.* ADDISON.

2 RICH. EQ. (S. C.) 273.—1846.

A NOTE was given to Mrs. Addison, during coverture, for money, the earnings of a school kept by her.

The note was delivered to the wife at its execution and remained in her possession till the death of the husband, and ever afterwards, until it was settled and taken up by the obligors. This settlement took place the 8th of March, 1842, after administration to the husband had been granted to the plaintiff.

The settlement was entirely between the wife and Meetze and Bouknight, two of the makers of the note, the administrator having nothing to do with it; and it was effected by these obligors receiving and giving up to Mrs. Addison sundry notes and accounts, which the said Meetze alone, and the said Meetze and Bouknight, as partners, held against her deceased husband; to which were added the amount of a note given by said deceased to Mrs. Arthur; an account against him in favor of Meetze, Harmon & Co., and sundry small accounts against Mrs. Addison herself: the whole amounting to \$1,891.13, at the date of the settlement. These were given for the sealed note held by Mrs. Addison.

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<sup>1</sup> "If the husband deliver to his wife a piece of cloth to make a garment, and dies, albeit it was not made into a garment in the life of the husband, yet the wife shall have it, and not the executor, inasmuch as it was delivered to her to that intent. But against the debtee of the husband the wife shall have no more apparel than is convenient. Mich. 40 & 41 Eliz. *Harwel's Case*." — BARON AND FEME, 1738, p. 79.

It appears from the accounts of the administrator of Mr. Addison, that even if this sealed note be regarded as parcel of his intestate's estate, the assets will fall far short of satisfying the demands against it; and that after applying them to the bond debts, very little, if anything, will remain for the simple contract creditors.

Under these circumstances, the creditors at large, and especially the bond creditors of the intestate (all being before the court as parties), have advanced the claim that the sealed note, held and given up by Mrs. Addison, as already stated, was parcel of her husband's estate, and should be added to the assets; and they contend that in the settlement, Meetze and Bouknight have received a greater amount, upon the demands which they held on the deceased, than they were entitled to receive in a regular court of administration.

Appeal from the decree of the chancellor.

*Curia per* JOHNSTON, CH. The reasoning of the decree rests entirely upon the assumption that a bond or sealed note given to a woman during coverture is, at law, the unqualified property of her husband, and if this assumption is sustainable, I do not perceive any error in the conclusions which the decree draws from it.

I assume this position with the less hesitation, because it seemed to be conceded in the argument, and because it had been conceded in *Herbmont v. Herbmont*, by eminent counsel, whom I endeavored to draw into the discussion of it.

But it has been discussed here; and I am satisfied that the position, so far from being sustained, is contradicted by the best authorities.

The result of the examination is, that the husband's right of property is qualified, and dependent altogether upon the steps he may take to assert it.

The right of the husband to the choses of the wife may be determined by considering the remedies which the law gives him in relation to them; and the incidents which pertain to the remedies he may adopt.

To the choses belonging to the wife before the marriage, the husband can lay no claim in his own name, or in his own right; but must join the wife in any action he may bring for reducing them into his possession. If he die before judgment, the chose survives to the wife; or if he obtain judgment and die before it is satisfied, the judgment enures to the wife as survivor.

Upon choses accruing to the wife during coverture, the husband may sue alone, or he may concede to the wife an interest in them, and join her in the action; and if he take no exclusive claim by suing in his own name, or join his wife in the action, but die before

judgment, or after judgment but before satisfaction, the chose, or the judgment, as the case may be, survives to the wife, precisely as in the case of choses accrued to her before the marriage.

The only difference between ante-nuptial and post-nuptial choses, therefore, is, that the husband must join the wife in the action for the former, but has an option whether to join her or sue alone for the latter. If he has not reduced them before his death, they both equally go to the wife by survivorship.

In this case, Mr. Addison neither sued in the one form nor the other; nor made any claim whatever to the sealed note, the subject of the decree; — and the consequence (if the positions I have stated be true) is, that upon his death it belonged, in law, absolutely to his wife.

For the truth of the position I might refer to two elementary writers, in common use. Chitty, speaking of choses accruing after the coverture, says (1 Chit. Pl. 18): “Where the wife can be considered as the meritorious cause of action (as if a bond or other contract under seal be made to her separately, or with her husband); or if, in the case of her personal labour, there be an express promise to her, or to her and her husband, she may join with the husband, or he may sue alone; and it has been held, that she may be joined in all cases, upon an express promise to her.”

“The effect,” says he (id. 20) “of joining the wife in an action, when the husband might sue alone, is, that if the husband die whilst it is pending, or after judgment, and before it is satisfied, the interest in the cause of action will survive to the wife, and not to the executor of the husband; though, if he sued alone, she would have had no interest.”

Mr. Stephens (1 N. P. 744) lays down the same positions.

Premising that where the husband and wife join in an action, founded upon the services, etc., of the wife, and there is no express promise in the case, it must appear in the declaration that the services were rendered by her, so as to show that she is the meritorious cause of the suit; but that if the action is founded on a note or bond to her, or upon any other instrument importing consideration, no such averment is necessary. 1 H. Bl. 144; 2 M. & S. 393. I proceed to show from a few cases, promiscuously taken from both the law and equity jurisdictions, that the elementary writers already quoted are borne out in the propositions laid down by them.

It is true that there are a few cases (Bunb. 188; 2 Eq. Ab. 1; 2 Bl. R. 1236) to the contrary, but the current of cases, especially those of later dates, are with them. [*Here follows a statement of the following cases: Brashford v. Buckingham, Cro. Jac. 77; Philliskirk v.*

*Pluckwell*, 2 M. & S. 393; *Oglander v. Baston*, 1 Ver. 396; *Schoonmaker v. Elmendorf*, 10 Johns. R. 49; *Coppin v. —*, 2 P. Wms. 496; *Nash v. Nash*, 2 Mad. R. 411, first Am. ed.]

It seems to me that these cases are sufficient to settle the question as to the right at law.

Still it may be said, that though the doctrine be as stated, as between the husband, or his representatives, and the wife, it must be otherwise as between the latter and the creditors of the former. That it may lead to fraud: — for if a bond or note, executed in the name of the wife, be allowed to survive to her, it will be easy for the husband, when the consideration really proceeds from him, and not from the wife, to take the obligation in her name, and thus secure a benefit to her at the expense of his creditors. But there is no such danger. If the chose arises in truth, as in this instance, from the wife as the meritorious cause, there is no fraud in allowing her the benefit of it; and if it arises from the funds or property of the husband, the proof of that fact will demonstrate the fraud and prevent its being carried into effect.

It is ordered, that the decree be reversed, and the bill pertaining to this matter, as against the defendants, Meetze, Bouknight and Scott, dismissed. The costs to be paid out of the estate of Mr. Addison before distribution.

JOHNSTON and DUNKIN, CC., concurred.

## CAPLINGER v. SULLIVAN.

2 HUMPH. (TENN.) 548.—1841.

REESE, J. This is an action of detinue for slaves. The property in question was bequeathed by the last will and testament of Boling Felts to his wife, for life, and after her death to Ann Sullivan, the plaintiff in this suit, then the wife of William Sullivan, and the said William was appointed executor of the will. He duly took upon himself that office, and in 1819, purchased of Mary Felts, testator's widow, the property in question, for the sum of one hundred dollars per annum, to be paid to her during her life.

In 1830, Mary Felts acknowledged in writing her reception of a sum in gross, from William Sullivan, in satisfaction of her annuity. Subsequently, in the same year, William Sullivan conveyed the slaves, for a valuable consideration, to Caplinger, the defendant, and put him in possession thereof, he himself having been possessed of them from the time of his purchase in 1819. William Sullivan died in 1835. Mary Felts, the owner of the slaves for life,



and Ann Sullivan, the wife of William, to whom they were limited in remainder, surviving. Mary Felts died in 1838.

These facts, in the Circuit Court, were found by the jury in a special verdict, and judgment thereon was pronounced by his honor the circuit judge in favor of Ann Sullivan, the plaintiff, and the defendant, Caplinger, has appealed in error to this court.

Justice Story, in his Commentaries on Equity, paragraph 1413, states it as a principle, that, "no assignment by the husband, of reversionary chosses in action, or other reversionary equitable interests of the wife, even with her consent and joining in the assignment, will exclude her rights of survivorship." The assignment, he adds, "is not, and cannot from the nature of the thing, amount to a reduction into possession of such reversionary interests."

The general principle thus laid down we find to be abundantly sustained by authority, and particularly by the leading cases on the subject, *Purdew v. Jackson*, 1 Russ. 1, determined by Sir Thomas Plummer, Master of the Rolls, and the case of *Honner v. Morton*, 3 Russ. 65, determined by Lord Chancellor Lyndhurst, 15th April, 1827.

The point settled in the last case is, that where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund, in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and tenant for life outlive the husband the wife is entitled, by right of survivorship, to claim the whole of the shares of the fund, against such particular assignee for valuable consideration. The Lord Chancellor refers to the principal cases relied on, on either side, and particularly to the case before Sir Thomas Plummer, and concludes, after considering the question in all its bearings, and the authorities and principles on the one side, and on the other, that the judgment of the Master of the Rolls in *Purdew v. Jackson* was right, and that the husband dying while the wife's interests continue reversionary, had no power to make an assignment of property of this description, which shall be valid, against the wife's surviving.

But it is urged on behalf of the defendant, in this case, that the husband did not die while the wife's interests in the property continued reversionary; for it is said that the reversionary character of the interest was terminated by the purchase on the part of the husband from the tenant for life. But this we think is not so. For if after this purchase, the husband had died without assignment, can it be doubted, that the personal representative of the husband would have been entitled, during the existence of the tenant for life, to the property in question, and after that that the wife would have been entitled by survivorship.

The wife had no interest in the husband's purchase, he stood in the place of tenant for life. The tenancy for life still continued, and the reversionary interest unaffected by such purchase, could not commence in possession till the life estate terminated. The husband possessed the slaves, but he possessed them as purchaser, not as husband, and his title and possession were of, and commensurate with, the life estate, and that only. Here was no merger of estates. The life estate belonged to the husband solely and absolutely as purchaser; the reversionary interest or remainder, to husband and wife, in right of the wife, and liable to become his absolutely by survivorship. If the husband, having assigned, had continued to live till the lifetime estate had terminated, then, indeed, as a court of chancery views such assignments as an agreement to assign when in his power and considers that also as done which ought to have been done, the assignee, for a valuable consideration, would, in equity, have been entitled to the property.

We have been referred by defendant's counsel to the case of *Pinckard v. Smith and Wife*, Littell's Select Cases, 331, as bearing on this question. The court, in that case, seemed to be of opinion that a vested remainder in a slave, occurring to the wife during coverture, so far vested in the husband, as that he would be entitled to recover the same, without administration on the wife's estate. But they also state it as their opinion that it does not so vest as to defeat the wife of her right by survivorship. The case, whether properly determined or not, can, therefore, be no authority bearing upon the case at the bar.

Upon the whole, we are of opinion, that the Circuit Court pronounced the proper judgment upon the special verdict, and we, therefore, affirm that judgment.

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### HART v. LEETE.

104 Mo. 315.—1891.

BLACK, J. The plaintiff, as purchaser of real estate at an execution sale, brought this suit to set aside a deed from defendant, James M. Leete to defendant Simmons, conveying the property in dispute to Simmons in trust for the use of the wife of said Leete, on the ground that the deed was made in fraud of creditors. The record is lengthy, and it is deemed advisable to here state the case in its outline, leaving the details of the evidence to be narrated in connection with the question to which it relates.

James Harrison died leaving a large estate, and, by his will,

which was probated in 1870, devised one-fifth of his estate to his daughter, Cordelia. On the twenty-eighth of June, 1871, she married the defendant, James M. Leete, who was a physician, having property of no greater value than \$3,000, and an income of not exceeding \$1,000 per annum. Edwin Harrison was executor of the will, and, as such, paid over to Dr. Leete, from time to time, from 1871 to 1884, not less than \$250,000. In addition to this he turned over to Mrs. Leete, on the 29th of September, 1876, stocks and bonds amounting, face value, to \$263,740.

Dr. Leete purchased the property now in question in September, 1873, and took the title in his own name. He paid for it \$12,000, one-fifth in cash and the residue by his individual notes due in one, two, three and four years, and secured the same by a deed of trust on the property. The cash payment was made by a cheque of the executor payable to Dr. Leete and charged to Mrs. Leete, on account of her distributive share in her father's estate. The subsequent payments were made from the funds received from the executor.

Dr. Leete built a residence upon the property at a cost of \$40,000, and paid for the same from August, 1875, to August, 1876, by cheques drawn on funds received by him from the executor on account of his wife's inheritance. He was a stockholder and officer of the Harrison Wire Company, and he endorsed the paper of that company to a large amount. On the 12th of December, 1883, the Harrison Wire Company made its note for \$25,000 due in six months, payable to Dr. Leete, which was endorsed by him. Augustus B. Hart purchased the note, and when it became due it was renewed for five days. It remained unpaid on the 9th of December, 1884, at which time Dr. Leete owed other large sums of money, and he and the Harrison Wire Company were then insolvent. On that day he made the deed now in question to Simmons, conveying the property in suit to Simmons in trust for Mrs. Leete. The deed professes on its face to be made in consideration of \$5, and for the further consideration that the money which paid for the property and the improvements "was money, income, increase or profits of personal property belonging to" Mrs. Leete.

Augustus B. Hart recovered judgment on the note against Leete in January, 1885, under which the property was sold, and the plaintiff, Oliver A. Hart, became the purchaser in March of the same year. The defendants caused notice to be promulgated at the sheriff's sale to the effect that the property belonged to Mrs. Cordelia Leete.

The case was heard by a referee, who made report to the effect that the deed should be set aside, because made in fraud of credit-

ors to the extent of six hundred and twenty-four thousandths of the whole title. Numerous exceptions were filed to the report by both sides, but they were all overruled, and the report confirmed, and both sides appealed to this court.

\* \* \* \* \*

It becomes necessary to determine whether Dr. Leete became the owner of the money received by him prior to March 25th, 1875, and this depends upon the question whether he reduced the same to his possession.

It is often said that by the common law the marriage vests absolutely in the husband all articles of personal property then owned or thereafter acquired by the wife; but under the influence of equity rules it is well settled that the husband may waive his right to his wife's personal property, and permit her to retain the same free from any claim on his part. *Botts v. Gooch*, 97 Mo. 88, and cases cited. But the wife's choses in action stand on still a different footing. They do not in any case vest in the husband by virtue of the marriage alone; but he has the right and power to reduce them to his possession, and when this is done, and not before, he becomes the owner of them. A legacy or a distributive share accruing to the wife is a chose in action. *Leakey v. Maupin*, 10 Mo. 368; 2 Kent (13th ed.), 135. As a general rule the receipt by the husband of the money due upon the wife's chose in action will constitute a reduction to his possession. 1 Bishop on Married Women, sec. 114. But he may collect and invest the money for her, and if he receives the money for her and promise to account to her or her trustee therefor, she may claim the fund as her own, even as against his creditors; for an appropriation so made would not amount to an appropriation to his own use. *Terry v. Wilson*, 63 Mo. 493. While there is some diversity of opinion concerning the intent of the husband, the better view, according to Bishop, is that the mere receiving, by the husband, of the wife's property will not be such a reduction of it to his possession as will affect the wife's survivorship, or her equity to a settlement. To have that effect he must receive it solely in the exercise of his marital right, and for the purpose of appropriating it to his own use. Bishop on Married Women, sec. 119. When the husband collects the money due upon his wife's chose in action, not as agent or trustee, but for the purpose of devoting it to his own use, there can be no doubt but this constitutes a reduction to his possession, and the money then becomes his own and liable for his debts.

Now the principal claim on the part of the defendant is that Dr. Leete, in collecting these moneys, and in investing the same, acted



for and as the agent of his wife, and hence the money at all times continued to be her property. It appears he received various amounts of money from the executor during what is called each settlement year, and at the close of each year, when it became necessary for the executor to make settlement with the probate court, these various payments were consolidated, and he and his wife joined in one receipt to the executor. As to the disposition of the moneys, the referee made the following findings, which are well supported by the evidence: "Upon the receipt of these moneys Dr. Leete apparently used them as if they were his own. Some he used for personal expenses and the support of his family. He invested portions of them on his own account, or name, in securities. Collected and used the earnings and sold the securities and used the proceeds. He invested some of these moneys in various business companies, in his own name, and in some instances thus lost them. If the moneys were idle he kept them deposited in bank, in his own name, and he purchased the land here in question in his own name, and used some of these moneys towards paying for it and erecting the dwelling thereon. He did nothing in the name of his wife, nor had he any agreement with her as to the use of the moneys, but continued his operations in much the manner indicated, until the period and time he conveyed this property to his wife, as trustee, a period of ten or eleven years."

It is very true Dr. Leete testified that he received the moneys and invested them as the agent of his wife, and that he never intended to make them his own property, and this evidence must be considered with the other evidence in the case. Still the uncontradicted evidence is that he collected the moneys, made no report to his wife, and was asked to make none; kept no separate account of the funds he thus received, purchased stock in various corporations in his own name, and had a financial standing in the community where he resided. We have read and re-read the evidence, and we do not find a single circumstance to support the assertion that he acted for and as the agent of his wife. The long series of acts show, and they show conclusively, that he received the funds and appropriated them by virtue of his marital right, and the claim now made that he was all the while acting as the agent and trustee of his wife must be an afterthought. That he reduced the \$117,000 to his own use is too clear to admit of any doubt. The property in question belongs to Dr. Leete to the extent that the land and improvements were paid for out of the moneys so appropriated to his own use.

*Wife's Chattels Real.*RILEY'S ADMINISTRATOR *v.* RILEY.

19 N. J. EQ. 229.—1868.

THE CHANCELLOR. The complainant, as administrator of the estate of Ann Riley, calls upon the defendant to account for the rents of certain leasehold property in Jersey City, held by Ann Riley at her death, and which the defendant has received; he claims to have received them in his own right, and that they are legally his own, by a bequest in the will of Miles Riley, the husband of Ann. Ann Riley became entitled to the leasehold estate by the will of her former husband, James Cummings, who bequeathed to her one-third of it, and a right of support out of the other two-thirds. After Cummings' death she was married to Miles Riley, who died in her lifetime, without having in any way aliened or disposed of the leasehold estate, but by his will gave it to his brother Owen Riley, the defendant.

The defendant claims that Miles Riley in his lifetime had erected buildings upon this property, and collected the rents, and by this he had shown his intention to appropriate this leasehold, which, as a chattel real of his wife, he had a right to reduce into possession and appropriate.

The evidence shows that in the life of Miles Riley, and after his marriage with Ann Cummings, buildings were erected on the premises; but the clear weight of evidence is, that they were erected by his wife, and paid for out of the rents of the whole premises, which the executors of Cummings permitted her to receive and collect for that purpose. Miles Riley appears to have aided by performing some work in the erection of the buildings, and to have contributed a few dollars towards the erection.

The only question that arises is, whether these leasehold premises were disposed of, or appropriated by Miles Riley in his lifetime, so as to vest the property in him, and take away the right of his wife after his death. Miles Riley died in 1848, and this question must be decided by the law as it stood then. By that law, the personal property of a woman, upon her marriage, vested in her husband; her goods and chattels absolutely; he had the right to the possession of her choses in action, and of her chattels real, and could at any time dispose of, collect, or sell them, and by this the proceeds of them became his absolutely; but if he did not reduce them to possession by disposing of them, or some equivalent act, they sur-

vived to her, and would not pass by his will, which did not take effect until his death, when the title had become vested in her by the survivorship.

Taking possession, collecting the rents, interest or dividends has never been held to be a disposition of the property, or a reduction into possession, so as to take away the wife's right of survivorship. Nor has it ever been held that the erection of buildings by the husband on the leasehold lands of the wife was such disposition of them as to take away her right. An actual disposition by sale, lease or mortgage, or contract for such object, has always been required to take away the wife's right by survivorship. A mortgage or a sale of part, or a lease of part, or for a less term only bars the wife *pro tanto*; her right of survivorship remains in the equity of redemption, and the residue of the premises or term.

In this case no interest in the premises passed by the will of Miles Riley; the whole survived to Ann Riley, and her administrator is entitled to the fund.

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### *Wife's Real Property in General.*

#### BABB *v.* PERLEY.

1 ME. 6.—1820.

THIS was an action of trespass on the case for an injury done to the interest of the wife, by cutting down and carrying away sundry trees standing on land of which the plaintiffs alleged themselves to be seized in right of the wife. At the trial of this action before Wilde, J., at the last October term in this county, it was admitted by the defendant that the plaintiffs were seized as alleged in their writ, until he, being a judgment creditor of the husband, extended an execution in his own favor on the *locus in quo*, as the estate of the husband; and it appeared that this extent was made with the formalities of law. After the extent, the defendant cut down and carried away, and sold about fifty cords of wood growing on the lot in question. Upon this evidence the judge instructed the jury that by virtue of the extent of the execution the defendant acquired all the title of the husband to the *locus in quo*, and that the cutting and selling of the wood was fully justified; and a verdict was thereupon returned for the defendant, subject to the opinion of the court upon the correctness of those instructions.

MELLEN, C. J. The facts in this case present some questions, respecting which judges and counselors have taken different views.

They appear somewhat novel and we do not find that they have received any express judicial decision. We have examined the cause with much attention, and after some vibration of opinion have at length arrived at a result with which we are all satisfied.

The facts reported by the judge who sat in the trial of the cause led the counsel, in the argument, to the consideration of two questions; and it may be convenient for us to pursue the same course.

The first inquiry is, "What were the rights and liabilities of Babb in virtue of his acquiring a freehold estate in right of his wife in the land in question, and in consequence of his destroying or selling and disposing of the wood or timber growing on the land?"

The second inquiry is, "What are the rights and liabilities of Perley, as assignee of said Babb and owner of his former interest in the land, in virtue of his ownership and consequent upon his destroying or selling and disposing of said wood and timber?"

With respect to the first question, it may now be observed that the land on which the trees were cut by Perley is admitted to be a wood lot, uncultivated, and in a state of nature.

When a man marries a woman who is seized in fee of lands, he thereby gains a freehold in her right. He acquires a life estate. It will be an estate for the life of the wife only — (unless he be tenant by the curtesy) in case he should survive her; or an estate for his own life, in case she should survive him; because the law presumes that the coverture will continue until the death of one of the parties. "He does not become, by the marriage, absolute proprietor of the inheritance; but as the governor of the family, is so far the master of it, as to receive the profits of it during her life." Co. Litt. 351; 2 Bl. Com. 433; *Barber v. Root*, 10 Mass. 261. These profits — this usufruct of the wife's lands, the husband may dispose of according to his pleasure, without or against her consent.

For any injury to the annual profits, or for taking away the emblements, the husband may maintain an action against the wrongdoer, in his own name, without joining the wife. But for an injury to the inheritance, as for cutting down the timber growing on the wife's land, he cannot maintain such action without joining the wife; for the damages will survive to her. 3 Lev. 403; Vern. 82; Reeves, Dom. Rel. 130, 133.

These cases mark the distinction between the rights of the husband and those of the wife in relation to the lands of which they are seized in her right. If, then, the husband has a right only to the usufruct or profits of his wife's lands, the question is, what were the rights which Babb had in the land above mentioned, and what control over it? Could this land yield any profits, according to the



legal signification of the term? Some light may be thrown upon this point by considering the principles of the decision in the case of *Conner v. Sheppard*, 15 Mass. 164. In this case the court decided that a widow could not by law be endowed by lands in a wild and uncultivated state; and the reason assigned by the court is, that "of a lot of wild land, unconnected with a cultivated farm, there are no rents and profits." Again they say, "In many instances the inheritance would be prejudiced without any actual advantage to the widow to whom the dower might be assigned. For, according to the principles of the common law, her estate would be forfeited if she were to cut down any trees valuable as timber. It would seem, too, that the mere change of the property from wilderness to arable land, or pasture, might be considered as waste." "The very clearing of the land — would be actually, as well as technically, waste of the inheritance."

In the case of *Sargeant et al. v. Towne*, 10 Mass. 303, the court determined that a devise of wild and uncultivated land carried a fee without any words of inheritance; because a life estate would be of no use to the devisee. He would not, even if he could without committing waste, undertake the cultivation of the land devised.

It would seem from the authorities above cited, that the plaintiff Babb, prior to the extent of Perley's execution, had no right to cut down the timber on his wife's land, or to do those acts which, in the case of a tenant for life, or years, would be waste. It is true Babb had the power to do it; and so he had the power to pull down a house, had there been one on the land; or to beat and wound his wife; — but not the right to do this; because in the last case he would be indictable for the offense: — and, we believe that a Court of Chancery would prohibit a husband from a wanton destruction of the wife's house or property. The wife, in all these cases, is destitute of the usual remedy by action for damages against the husband for this or any other injury to her inheritance; because a wife can in no case sue her husband. The agreement to marry, and the consequent marriage, amount to a waiver of this right of action against each other. This principle is founded on reasons of sound policy. But it does by no means follow that because the husband has the power of doing many acts prejudicial to the interest or inheritance of his wife with impunity, that he can assign and transfer this power to a third person, and give him this privilege of impunity. In this situation of parties policy does not require that this impunity should exist; and, therefore, it does not exist.

As to the second question, we would observe that whatever were the rights and liabilities of Babb as husband, those of Perley, the

assignee, seem to be more defined and better explained; and if any doubt remain as to Babb's rights before the extent of Perley's execution, the cause may be decided on this second point by the application of principles well settled and understood.

It is admitted that the extent of Perley's execution against Babb, upon his estate in the land in question, operated to transfer and convey to Perley all Babb's interest or estate in such land. It certainly could not convey any more, though it might place the estate in a different situation in respect to other persons. Let us then suppose that, instead of this extent, Babb had by his deed conveyed to Perley all his right, title and interest in and to the land belonging to his wife. The facts would then present to us no other than the common case of the division of a fee simple estate into a freehold and a reversion. The freehold or life estate would be in Perley; and the reversion would be in Babb's wife; because Babb, her husband, had not, and could not have any control over this reversion. Nothing short of a deed signed by her as well as by him could operate to convey it to Perley. The extent has not affected, in any degree, her reversionary interest. Perley, then, being only tenant for life of the land in virtue of the extent of his execution, he could not lawfully commit waste. It would be inconsistent with his estate.

The act complained of is the cutting and carrying away and selling about forty cords of wood. Of course, it was an act which a tenant for life has no right to do; it was not for fire wood nor fences; it was neither for building nor repairing.

In the case before us, Mrs. Babb, the reversioner, sues Perley for committing this waste on her inheritance. Her husband is joined in the action, not because he has any interest, for that has already been legally conveyed to Perley; but because a *feme covert* can never sue alone, unless in two or three special cases, forming exceptions to the general rule. And now, we may ask, why should not the action be maintained? If it should be urged that it will be prejudicial to the rights of the husband's creditors, by depriving them of the power of converting the lands levied upon to any profitable use; the answer is, the creditors of the husband cannot have any more control of the wife's land than the husband himself had. The creditors may avail themselves of the profits of the wife's land in satisfaction of their demands against the husband; but if there are no profits, it is nothing more than the common misfortune of those creditors whose debtors are insolvent.

The law is consistent and just. It subjects the land to the payment of the wife's debts, and the profits to the payment of the debts of the husband. After mature deliberation, we perceive no

other mode of deciding this cause without changing the nature of legal estates, and disturbing those principles by which such estates are created and protected.

We are unanimously of opinion that the verdict must be set aside and a new trial granted.

*Wife's Dower.*

*In re* MARY ANN ALEXANDER.

53 N. J. Eq. 96.—1894.

THE petitioner, Mary Alexander, claims to be the owner of a parcel of land, subject to the inchoate right of dower of Mary Ann Alexander, a lunatic. The petitioner asks that the right of dower be released under the act of March 27, 1878, which provides that it might be so released, if "the interest of the owner of such lands" requires it.

GREEN, V. C. \* \* \* It is objected that the act of 1878 does not apply to cases where the marriage from which the right to dower springs was contracted, and the lands in which it is claimed vested in possession in the husband before the passage of the act.

The question involved is the scope of legislative power over dower inchoate at the time of enactment. A review of the numerous decisions bearing on the point, in the hope of extracting some recognized governing principle, would be a profitless task, as the cases developed an irreconcilable contrariety of opinion. Judges affirming the power of the legislature to modify, control and even abolish inchoate dower, argue that it is a mere possibility because it is a right which cannot vest before it becomes consummate by the death of the husband; that it is a mere incident to the marriage relation, established by law and not by contract, and therefore subject to legislative change or destruction. On the other hand, while recognizing that the consummation of dower is contingent on the death of the husband in the lifetime of the wife, other judges argue that inchoate dower is something more substantial than a mere possibility, viz., that it becomes, coincident with the seizin of the husband, an interest in such real estate. This is based on well-known incidents of the right. "Dower was, indeed, proverbially the foster-child of the law, and so highly was it rated in the catalogue of social rights, as to be placed in the same scale of importance with liberty and life." Park Dow. \*2; Co. Litt. 124b. When it had attached by the seizin of the husband, it could not be discharged by any act of

nis, although the owner of the fee, without the wife's concurrence. Park, Dow. 5. It is an encumbrance (*Porter v. Noyes*, 2 Greenl. 22; s. c. 11 Am. Dec. 30, note at 39), and, as such, defeats the contract to convey an unencumbered title (*Ib. Jones v. Gardner*, 10 Johns. 266), and comes within a covenant against encumbrances. *Shearer v. Ranger*, 22 Pick. 447; *Carter v. Denman*, 3 Zab. 260. It is a valuable consideration for a conveyance to a wife (*Bullard v. Briggs*, 7 Pick. 533; *Garlick v. Strong*, 3 Paige, 440), or for a promissory note to her. *Sykes v. Chadwick*, 18 Wall. 141. The wife may maintain an action for its protection (*Petty v. Petty*, 4 B. Mon. 215; s. c. 39 Am. Dec. 501; *Thayer v. Thayer*, 14 Vt. 107; s. c. 39 Am. Dec. 211, 218), or file a bill for the redemption of a mortgage covering it. *Davis v. Wetherall*, 13 Allen, 60. She must be a party to any suit affecting it. *Vreeland v. Jacobus*, 4 C. E. Gr. 231. That it is an interest in the land from the time of the seizin of the husband is the law in this State. *Wheeler v. Kirtland*, 12 C. E. Gr. 534.

In that case Catharine Kirtland was, and since 1836 had been, the wife of John Kirtland. On the 16th of December, 1869, her husband was the owner of about six acres of land in the county of Essex. On that day a judgment, was entered up against Kirtland, the husband. On May 30, 1870, the Essex public road board laid an avenue across the tract, taking two and eighteen hundredths acres. Damages were awarded to Kirtland, the husband, by reason of the taking and condemning of the same, to the amount of \$15,000. The judgment creditors served a notice on the road board warning them not to pay the award to Kirtland. Afterwards, by a sale under the judgment, one Whitney became the owner of the rights of Kirtland, the husband, in the premises, and entitled to the interest of the husband in the amount awarded for the portion of the premises condemned. The wife, by her bill, claimed to have an interest in the award by reason of her inchoate dower in the land so condemned. The Court of Errors and Appeals held that the inchoate dower of the wife was a valuable interest in the land condemned, the value of which passed into the award by the transmutation of the land into money, and that she was entitled to the amount decreed in her favor by the chancellor. Mr. Justice Reed, in giving the opinion of the court, refused to follow the cases of *Gwynne v. Cincinnati*, 3 Ohio, 24, and *Moore v. City of New York*, 8 N. Y. 110, upon which many of the decisions will be found to be based. The case of *Wheeler v. Kirtland* expressly declares that inchoate dower is a valuable interest in land, and brings it within the protecting clause of the Constitution, which provides that private property shall not be taken for public use without just compensation. If this is so, on what principle can it



be said that it is not also within the rule of legislative inhibition that private property shall not be taken for private use with or without compensation, a rule which, if not a corollary from the clause quoted, springs out of the first clause of the bill of rights of our Constitution, which declares that the right of acquiring, possessing and protecting property is inalienable? Under that rule it is not competent for the legislature, by enactment, to take the property of A and give it to B, nor, under the principle of *Wheeler v. Kirtland*, to take a valuable interest in land which A. has acquired and transfer it to B. This inhibition of arbitrary legislation as to a right in property is not confined to a transfer of it from one person to another, but extends to attempts to impair its value or weaken its security. As the inchoate right of dower of Mrs. Mary Ann Alexander has attached to the land in question prior to the passage of the act, I am of opinion that its provisions do not apply to her interest therein.<sup>1</sup>

#### IN THE MATTER OF THE ESTATE OF HENRY P. PULLING.

97 MICH. 375.—1893.

APPEAL by a widow from an order of the Circuit Court reversing an order of the Probate Court which allowed her dower in certain lands sold by her husband on contract, and not fully paid for during his lifetime. Reversed, and judgment certified to the Probate Court, giving the petitioner dower in the interest of her husband in said lands, to be admeasured by giving her a sum of money in lieu thereof.

MCGRATH, J. The circuit judge found that Henry P. Pulling and Jeane W. Pulling were married April 26, 1890; that said Henry P. Pulling died July 15, 1890, leaving appellant, his widow, surviving him; that at the time of his death said Henry P. Pulling was seized in fee of ten parcels of land; that prior to the marriage of Henry P. Pulling, he had made and executed nine separate contracts for the sale of said parcels of land; that at the time of the said marriage, and also at the time of his death, the vendees under said contracts were, respectively, in the possession of the several tracts of land under said contracts, which were then in full force,—that is, none

<sup>1</sup> "We think that it must be considered as settled in this State, notwithstanding *Moore v. The Mayor*, and some *dicta* in other cases, that, as between a wife and any other than the State, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end."—*Simar v. Canaday*, 53 N. Y. 298, 304.

of them had been declared forfeited. The purchase-price in one instance was \$400, in another \$875, and in another \$1,000. The others were from \$1,100 to \$14,500. The aggregate consideration was originally about \$49,000. Payments had reduced this amount to \$45,000. The sole question raised is whether, as between the widow and the estate, the interest in these lands shall be treated as realty or as personalty. The circuit judge found, as a matter of law, that the widow was not entitled to dower in these lands, and the widow appeals.

Our statute provides (How. Stat. sec. 5733) that: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

It is insisted on behalf of the estate that at the time of the marriage, Henry P. Pulling held the legal title only in trust for the purchasers. The cases cited, however, in which this has been asserted, and the right to dower denied, are, without an exception, cases where the vendee had paid the entire consideration. [*Here follows a statement of the following cases: Kintner v. McRae*, 2 Ind. 453; *Stevens v. Smith*, 4 J. J. Marsh, 64; *Oldham v. Sale*, 1 B. Mon. 76; *Gaines v. Gaines*, 9 B. Mon. 295; *Rawlings v. Adams*, 7 Md. 26; *Cowman v. Hall*, 3 Gill & J. 398; *Firestone v. Firestone*, 2 Ohio St. 415.]

In none of these cases had the husband, even at the time of the marriage, any beneficial interest in the land.

\* \* \* \* \*

In the present case it is not sought to subject the purchaser's interest, nor the interest held by the husband at the time of the marriage, to dower. The only claim made is that the interest held at the time of his death shall be regarded as realty. It is purely a question of the quality of that interest. The husband died seized, not of the legal title alone, but of the legal title with a beneficial interest aggregating \$45,000. A court of equity would undoubtedly interpose in any case to protect the interest of the purchaser, and this would be so even though the purchase-money had all been in fact paid during the lifetime of the husband. The wife's right would be regarded as attaching subject to the subsisting claim or existing contract, and would be liable to be defeated by the performance of the conditions of the contract by the purchaser during coverture. As is said in 4 Kent Com. 50: "The wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, existing before the inception of her right."

In the present case, the wife's dower has been defeated only so

far as the amount due upon the contracts has been reduced by payments. Even though a trust be implied, it is one coupled with a beneficial interest, and it is well settled that the wife of a trustee is entitled to dower commensurate with the husband's interest. 4 Kent, Com. 43.

In *Bowie v. Barry*, 3 Md. Ch. 359, the husband, in 1832, during coverture, purchased the land, taking from the vendor a bond conditioned to convey the title on payment of the purchase-money. In 1839 the husband sold the land, and gave to the vendee a bond for a deed. In 1843 the husband paid the balance of the purchase-money on his purchase and took a deed, and died in 1848. At his death a portion of the purchase-money upon the contract for sale made by him was unpaid. The court in that case say: "It may be that in equity an agreement of the husband to convey before dower attaches will, if enforced in equity, extinguish the claim to dower; but no case, I apprehend, can be found in which it has been held that a mere agreement to convey after the inception of the title to dower has defeated the title, though an actual conveyance without the concurrence of the wife would have done so. \* \* \* No case has been decided in which it has been held that a mere executory contract to convey by the husband has had the effect to defeat the dower."

Although in that case the legal title vested in the husband after marriage, he had, before deed to him, entered into a contract to convey that title, and there is no difference in principle between that case and the present.

Section 5887 only applies to cases where a forfeiture has been declared, and, in any event, could only apply to the three contracts, not exceeding \$1,000 in amount.

It follows that the widow is entitled to dower in the interest held by the husband at the date of his death, that interest being represented by the amount then due upon these contracts. We discover no difficulty as respects the admeasurement. Dower cannot be assigned of the lands in question, but a sum in lieu of dower may be awarded. *Brown v. Bronson*, 35 Mich. 415.

The judgment of the Circuit Court will, therefore, be reversed, with costs of both courts to appellant, and the judgment of this court certified to the Probate Court for the county of Wayne.

The other justices concurred.

ARCHER, J., IN *McCAULEY v. GRIMES AND WIFE*.

2 GILL &amp; J. (MD.) 323.—1830.

THE record presents in effect the same principle for adjudication which has heretofore come before the courts in several States of the Union. In *Holbrook v. Finney*, 4 Mass. Rep. 566, it was decided that a conveyance in fee and a conveyance by the grantee to the grantor by way of mortgage being considered as parts of the same transaction, did not give to the grantee such a seizin as entitled his wife to have dower in the granted premises. And in *Clarke v. Munroe*, 14 Mass. 352, where the mortgage was made to a third person, at the same time with the deed to the mortgagor, the same determination was had; in each of those cases the deeds were executed in pursuance of a previous agreement between the parties. In South Carolina, the same doctrine had prevailed before, as will be seen by a reference to *Bogie v. Rutledge*, 1 Bay, 312; this decision has been recognized, and approved in that State in a very recent decision. *Trustees of Frazier v. Centre & Hall*, 1 McCord, 279. These determinations have been followed in New York. In *Stow v. Tift*, 15 Johns. 458, the case in 4 Mass. 566, was cited and approved, and a judgment given in conformity with it; in the latter case, however, no agreement was proved, further than could be inferred from the execution of the conveyance and mortgage, and the internal evidence they furnished. In Pennsylvania, too, the same doctrine prevails. In *Reed v. Morrison*, 12 Sergeant & Rawle, 70, it was adjudged that as against the mortgagee for the purchase-money, the widow had no such seizin as would entitle her to dower. So far as we have examined the American cases, the decisions appear to be uniform against the widow's right to dower, unless subject to the payment of the purchase-money secured by mortgage—and Chancellor Kent, in his recent treatise on the Law of Real Property, approves these determinations. 4 Kent's Com. 38, 39. The cases in Massachusetts and New York proceed on the doctrine of instantaneous seizin. The deed and mortgage were looked upon as constituting but one contract, bearing the same date, and delivered at the same time; and that as no interval of time intervened, between the taking and rendering back the fee, the case might be assimilated to the conusee of a fine, whose wife would not be entitled to dower, because by the same fine the estate is rendered back to the conusor; it was there considered as merely *in transitu*, and not resting for an instant; the grant and render being one entire act. But, perhaps, there is no general rule in strictness, that in case of instantaneous seizin the



widow shall or shall not be entitled to dower; this must depend as well upon the character of the seizin as its duration; when a man has the seizin of an estate, though for an instant, beneficially for his own use, his widow shall be endowed; where the husband is the mere instrument for passing the estate, although there may be an instantaneous seizin, the widow shall not be endowed. 1 Thomas Coke, 665, 666, note G; Preston, Est. 546; 2 Bac. Abr. 371.

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FOLLETT, J., IN PRICE *v.* PRICE.

124 N. Y. 598.—1891.

By the common law, neither dower nor curtesy arises from a voidable marriage, if it be annulled during the lifetime of the parties, and when annulled by the judgment of a competent court, they are in the same situation in respect to each other, and to rights in the property of each other, as though a marriage had never been entered into, and the children born of it are illegitimate unless legitimated by a statute. *Aughtie v. Aughtie*, 1 Phill. 201; *Cage v. Acton*, 1 Ld. Raym. 521; Bish. on M. & D., secs. 116-118, 690, 712; Bish. on H. & W. secs. 247, 479, 482; 1 Bright. H. & W. 7, 322; 2 Id. 366; 1 Roper H. & W. 332; Stewart M. & D. secs. 147, 429, 437.

And in the absence of a statute saving the right to dower, the dissolution *a vinculo* of a valid marriage, for the fault of either party, bars it. *Barrett v. Failing*, 111 U. S. 523; *Frampton v. Stephens*, L. R. 21 Ch. D. 164; 14 Am. & Eng. Ency. of Law, 537; 5 Id. 921.

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GELZER *v.* GELZER.

1 BAILEY'S EQ. (S. C.) 387.—1831.

THE complainant was the widow of Thomas Gelzer, who died intestate; and this was a bill against his administrator, and distributees, to recover either her dower of the real estate of the intestate, or her distributive share of his real, and personal estate.

JOHNSON, J. The agreement, out of which the question arises, was entered into before, and in contemplation of the marriage between the complainant, then Sarah Lewis, and the intestate, Thomas Gelzer; and it recites that the said complainant had, "in her own right, an ample estate entailed and secured to her, of which the said Thomas would not take any benefit after her death;" in consideration whereof, and of the nominal payment of one dollar, she cove-

nants, and agrees, that if the said Thomas should die, she surviving, "she will not have, claim, or demand, or pretend to have, claim, or demand, any dower, or thirds, or any other right, title, interest, claim or demand, of, in, or to, any of the messuages, lands, tenements, and real estate, whereof the said Thomas may have been seized during the intermarriage aforesaid."

Under the statute 27 Hen. 8, c. 10, sec. 6, which is of force in this state, P. L. 51, this contract cannot operate as a bar to the complainant's right of dower, because, according to Lord Coke, nothing less than a freehold estate, to commence in possession at the death of the husband, settled upon the wife by way of jointure, would be allowed as a substitute, under the provisions of that statute; Co. Litt. 36b: and here nothing is provided for the wife. Neither can such a covenant operate as an estoppel at common law. It does not profess to be a relinquishment; and, moreover, she had, at the time, no interest upon which a relinquishment could operate. It can, therefore, bind, at law, only as an agreement not to claim, or demand her dower, etc. But equity frequently regards that as done which ought to have been done; or will, when it is necessary, compel parties, seeking the aid of the court, to do that which in conscience they are bound to do.

The complainant was of full age, and under no legal disability to contract; the subject-matter was legitimate; and the consideration of marriage is sometimes said to be the highest known to the law; and I confess that I have not been able to discover any rule or principle which discharges her from the obligation which this agreement imposes. She had an ample fortune of her own, so tied up that she could not confer it upon her husband; and in consideration that he would take her in marriage, she agreed not to claim her dower, or any right of inheritance in his estate. It is a contract without fraud, and apparently of perfect equality. Both Atherley and Roper treat this question as one admitting of no controversy. A jointure, to operate as a bar to dower under the statute, must consist of a freehold estate; but a woman, under no legal disability, may stipulate to substitute anything she pleases in place of it. Atherley on Marriage Settlements, 511; 1 Roper, Husband and Wife, 480. There is nothing in the case of *Hastings v. Dickinson*, 7 Mass. 153, opposed to this view; for the chief justice, Parsons, puts that case distinctly on the ground that the condition upon which the wife covenanted to renounce her dower was not performed, and could not be performed, in consequence of the insolvency of the husband. The case of *Glover v. Bates*, 1 Atk. 439, turned upon the infancy of the wife, at the time when she entered into the agreement.

She was, therefore, incapable of binding herself by an agreement, and nothing but a jointure, in conformity to the statute, could bar her of dower.

The appeal in this case must therefore be dismissed, and the decree of the Circuit Court affirmed; and it is so ordered.

O'NEALL, J. and HARPER, J., concurred.

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### CHURCH *v.* BULL.

2 DENIO (N. Y.), 430.—1845.

ON error from the Supreme Court. The action in the court below was ejectment brought by Bull and wife against Church, for the dower of Mrs. Bull, in lands of which a former husband was seized during their coverture.

THE CHANCELLOR. The testator, in this case, devised his real and personal estate to his wife during her widowhood, and after her death or remarriage he gave all his property, except some small legacies which were bequeathed to his daughters, to his three sons. But he did not state in his will that he intended this provision for his wife, during her widowhood, to be in lieu of her dower in his real estate after the determination of such provision, by her re-marriage. And the only question for our consideration now is, whether the disposition of his real estate after her re-marriage, is so inconsistent with her enjoyment of dower therein subsequent to that time, as to deprive her of such dower, and to leave her wholly unprovided for in case she should re-marry.

There is no natural equity in the principle which gives to the husband the right to dispose of his whole personal estate, the joint earnings of himself and wife, to her exclusion; nor in that which gives him the power to dispose of his whole real estate except the use of one-third thereof during the life of the wife. Hence the courts have always been astute in protecting the widow's right to the small pittance which the rules of the common law had given to her in the estate of her husband after his death. Hence, as Lord Bacon stated nearly two hundred and fifty years since, the tenant in dower was so much favored in the courts that at that early period it had become "the common by-word in the law, that the law favoreth three things, life, liberty and dower." Bac. Read. on the Stat. of Uses, 38; Jenk. Rep. 7 Cent. Ca. 16. The right of dower being a legal right, and thus favored by the courts, the wife cannot be deprived of it by a testamentary disposition in her favor, in the nature of a jointure, so as to put her to her election, unless the tes-

tator has declared the same to be in lieu of dower, either in express words or by necessary implication. In the cases of *Fuller v. Yates*, 8 Paige's Rep. 325, and of *Sanford v. Jackson*, 10 Id. 266, I had occasion to examine most of the cases on this subject which had then been decided, and I then concluded, as the result of all the cases in this State and in England, that the settled rule of law was, that to compel the widow to elect between the dower and a provision made for her in the will where the testator had not in terms declared his intention on the subject, it was not sufficient that the will rendered it doubtful whether he intended that she should have her dower in addition to that provision; but that to deprive her of dower the terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which such dower was claimed; so that the intention of the testator in relation to some part of the property devised to others would be defeated if such claim was allowed. And in the last case, which was the same as this, except that the widow in that case was entitled to the whole real estate, even after her re-marriage, while any of the children continued to be minors, it was decided that her claim for dower in the one-third of the real estate, subsequent to the termination of her particular estate in the whole of the same, was not necessarily inconsistent with a general devise of the whole of his property to his children after that time. Since that decision was made, the case of *Ellis v. Lewis*, 3 Hare's Rep. 310, came before Vice Chancellor Wigram, in England, and was decided in favor of the widow upon the same principle. He there says, "I take the law to be clearly settled at this day that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, *per se*, express an intention to devise the lands otherwise than subject to its legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by the widow of the dower by metes and bounds, or the devise standing alone will be construed as I have stated." And in *Harrison v. Harrison*, 1 Keene's Rep. 768, Lord Langdale says that *prima facie* the testator's farms, lands, and all his other real estate, must mean the real estate of which he had the power of disposing; which would be his real estate subject to lawful claims, and one of those claims would be the dower of his wife. Here the whole property is devised to the widow during her widowhood. Of course, no question of dower could arise while she continued a widow, as she was entitled to the possession of the whole during that time. And the subsequent devise of his whole real estate to his three sons is not necessarily inconsistent with an intention, on the part of the testa-



tor, that his wife should be left to her legal right of dower alone for her support, after the particular estate which had been devised to her had been determined, by her marriage.

In the language of the vice-chancellor and master of the rolls in the above cases, *prima facie* the devise of the testator's whole real estate to his three sons after that time did not *per se* express an intention to devise such real estate otherwise than subject to its legal incidents, one of which legal incidents was the widow's common-law right of dower therein.

For these reasons I think we cannot deprive the wife of the testator of her dower in the lands of her deceased husband subsequent to her marriage, consistently with the settled rule of law on this subject; and that the judgment of the Supreme Court was right and should be affirmed.<sup>1</sup>

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<sup>1</sup> "In California and a few other states the common-law dower has been wholly abolished, and a species of interest, borrowed from the French and Spanish laws, has been introduced, called "community property." This community property embraces both what at the common law would be real and personal estate, and in fact substantially the same rules govern the devolution of things real and things personal. The law of these states recognizes two kinds of property which may belong to the spouses in case of marriage—"the separate property" and the "community property." The separate property of either husband or wife is what he or she owned at the time of marriage, and what he or she acquired during marriage by inheritance, devise, bequest, or gift, and the rents and profits thereof. The separate property of each spouse is wholly free from all interest or claim on the part of the other, and is entirely under the management, control, and disposition, testamentary or otherwise, of the spouse to whom it belongs. All other property is community. It is a settled doctrine that all property acquired by the husband after the marriage, and during its continuance, is presumed to be community. During the marriage the husband alone has the custody, control, management and power of disposition of the community property, and it is liable for his debts; but still in theory the wife has an inchoate, undivided interest in it during the entire coverture, so that the husband cannot transfer it by mere gift or otherwise with the intent and purpose of defrauding her of her share, or of defeating her exclusive interest expectant upon his death. Upon the death of the wife, the entire community property vests in the husband, without the necessity of any administration. Upon the death of the husband, the community property is first subject to the payment of debts and expenses of administration, and of the residue the widow is entitled absolutely to one undivided half, which is partitioned, and set apart, and vested in her in the proceedings for administering upon the estate; while the other half is subject to the testamentary disposition of the husband, or if he dies intestate, devolves upon specified persons as his 'heirs.' In other words, the husband's power extends only to one-half of the community property, and he cannot by will devise or bequeath it in any manner or to any person so as to infringe upon the widow's vested right to one-half. With respect to the widow's election, whenever the husband has made a provision for her benefit, and has assumed to dispose of all the remaining community property, the California

*Husband's Estate by the Curtesy.*FERGUSON *v.* TWEEDY.

43 N. Y. 543.—1871.

THE wife of the plaintiff, being co-devisee with her brother of a certain farm, with a limitation over on the death of either without issue to the survivor, by deeds interchanged with her brother before marriage, partitioned, until either should die without issue and no longer, the farm devised, and went into exclusive possession of the part conveyed to her, the brother taking exclusive possession of the part conveyed to him. The wife died leaving issue (the defendant), and subsequently the brother died without issue.

The action was brought originally by Harvey D. Ferguson, the plaintiff's testator, for equitable relief.

FOLGER, J. This action cannot be sustained unless Harvey D. Ferguson, the testator, had in his lifetime an estate as tenant by the curtesy in the premises, or some part of them, which were recovered in the action of the respondents against Samuel G. Green, judgment wherein was rendered on the 1st of February, 1861. To establish such tenancy there were needed four things: Marriage, issue of the marriage, death of the wife, and her seizin, during marriage, of the premises in question. There is no dispute but that all of these existed, save the last.

It is a general rule that to support a tenancy by the curtesy there must be an actual seizin of the wife. *Mercer's Lessees v. Seldon*, 1 How. (U. S.) 37-54. The rule is not inflexible. There are exceptions to it. The possession of a lessee under a lease reserving rent, is an actual seizin, so as to entitle the husband to a life estate in the land as a tenant by the curtesy, though he has never received or demanded rent during the life of his wife. *Ellsworth v. Cook*, 8 Paige, 646. Wild, unoccupied or waste lands may be constructively in the actual possession of the wife. 8 J. R. 271. A recovery in an ejectment has been held equivalent to an actual entry. 8 Paige, *supra*. And it has been held that, where the wife takes under a deed, and there is no adverse holding at the time, actual entry is not necessary. *Jackson v. Johnson*, 5 Cow. 74.

Code has only legislated by prescribing the time within which her election must be made, in cases where an election is necessary, and by declaring that certain conduct by her shall amount to an election. The more important question, when a case for election arises from the provisions of a will, is left to be determined by the settled doctrines of equity jurisprudence which deal with that subject matter."—POMEROY, EQUITY JURISPRUDENCE, § 503. And see *Spreckels v. Spreckels*, 116 Cal. 339.

But the facts of this case open not the door for any of these exceptions to come in. Before the marriage of the testator to his wife, she did convey by quitclaim deed the premises in question for a term which was in its duration as long as her life. The grantee in that deed, thus acquiring an estate for her life in the lands, did enter, and he and his assign held the possession up to her death, and afterward. It is true that this deed was one of two interchanged between the parties to effect an amicable partition of premises held by them at that time in common. But the execution of these deeds, if followed, as it was, by possession in severalty, was valid and sufficient to sever the possession for the lifetime of the testator's wife. *Baker v. Lorillard*, 4 N. Y. 257; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314.

And from the time of the execution by her of that deed, until the day of her death, she had not, nor had her husband, actual possession of the premises; she nor he made claim to the possession of them; she nor he received rent or other profit from them; she nor he had right to ask possession or rent or profit. In short, there did not any fact exist which, for her lifetime, after the execution of the deed, gave her a constructive possession or right of possession. On the contrary, there did exist in another, so far as she and her husband were concerned, exclusive possession, and right of such possession, for a term which ran for her life. There was, then, an outstanding estate for life in the premises, which, beginning before her coverture began, did not end until her coverture ended. And it is settled, that if there be an outstanding estate for life, the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture. *Stoddard v. Gibbs*, 1 Sumner, 263-70; *In re Cregier*, 1 Barb. Ch. R. 598.

It is among the facts found by the learned justice before whom the action was tried, that the possession of the grantee in that deed, and of his assign, was actual and exclusive. It is found, also, that neither the wife of the testator, nor the testator himself, did at any time after the execution of that deed have actual possession of the premises, or receive the rents and profits thereof. And these findings are upheld by the proof.

There is no escape from the conclusion that there was lacking one of the essentials in a tenancy by the curtesy in favor of the testator.

This defect in the plaintiff's case being fatal, it is not necessary that we examine the other questions involved.

The judgment of the court below should be affirmed, with costs to the respondent.

All the judges concurring, judgment affirmed.

FOSTER *v.* MARSHALL.

22 N. H. 491.—1851.

**WRIT of entry.**

BELL, J. The principal question arising in this case is as to the effect of the Statute of Limitations upon the demandant's right of action. It appeared that the demanded premises were set off by a committee of partition, appointed by the Court of Probate, to Mary Foster, formerly Mary Eastman, the mother of the demandant, as her share of the estate of her father, Samuel Eastman, deceased, on the 14th of May, 1814. Mary Foster was then the wife of Frederick Foster, by whom she then had one or more children. Frederick Foster died in 1834, and his wife in 1836. They had six children, whose rights are said to be now vested in the plaintiff.

The defendant proved that in 1817, one Morrill was in possession, claiming to be the owner of the demanded premises. He conveyed the same by deed, dated July 3, 1817, to one Marshall, who entered and occupied, claiming title, till April 30th, 1847, when he conveyed to the tenant, who has since remained in possession. The tenant claims that he had perfect title by thirty years' undisturbed and peaceable possession. The demandant alleges that his right is not barred, because at the time when the disseizin occurred, in 1817, Mrs. Foster was a *feme covert*, and up to 1834 her husband had an estate for life in the premises and she had no right of entry until his decease, and consequently no right of action till then, and that since that time twenty years have not elapsed.

Under the Statute of Limitations, which was in force in this state before the Revised Statutes, it must be considered settled that the statute did not affect the right of a remainderman or reversioner, during the continuance of the particular estate; and that neither the acts nor the laches of the tenant of the particular estate could affect the party entitled in remainder. *Wells v. Prince*, 9 Mass. Rep. 508; *Wallingford v. Hart*, 15 Mass. Rep. 471; *Tilson v. Thompson*, 10 Pick. Rep. 359. No right of entry or action accrued to, or vested in the heirs of the wife during the continuance of an estate by the curtesy. *Jackson v. Schoonmaker*, 4 Johns. Rep. 390. But the party entitled is not barred until the usual period of limitation after the termination of the life estate. *Heath v. White*, 5 Conn. Rep. 228; *Witham v. Perkins*, 2 Greenl. Rep. 400.

If, then, the husband had, in this case, an estate by the curtesy, or any interest in the land which would entitle his wife, who survived, to be regarded as seized only in remainder or reversion, she and her heirs would have the full period of twenty years after the death of



the husband to commence their action. To constitute a tenancy by the curtesy, the death of the wife is one of the four things required. The estate of the husband is initiate upon the birth of issue. It is consummate on the death of the wife. 4 Kent's Com. 29; Co. Litt. 30a. By the intermarriage, the husband acquires a freehold interest, during the joint lives of himself and his wife, in all such freehold property of inheritance as she was seized of at the time of marriage, and a like interest vests in him in such as she may become seized of during the coverture. The husband acquires jointly with the wife a seizin in fee in the wife's freehold estates of inheritance, the husband and wife being seized in fee in right of the wife. Gilb. Ten. 108; Co. Litt. 67a; *Palyblank v. Hawkins*, 1 Saund. Rep. 253, n; s. c., Doug. 350. This interest may be defeated by the act of the wife alone; as if, at common law, the wife is attainted of felony, the lord by escheat could enter and eject the husband. 4 Hawk. P. C. 78; Co. Litt. 40a; Vin. Ab. Curtesy, A; Co. Litt. 351a. After the birth of issue the husband is entitled to an estate for his own life, and in his own right, as tenant by the curtesy initiate. Co. Litt. 351a, 30a, 124b; *Schermerhorn v. Miller*, 2 Cowen's Rep. 439. He then becomes sole tenant to the lord, and is alone entitled to do homage for the land, and to receive homage from the tenants of it, which until issue born must be done by husband and wife. 2 Black. Com. 126; Litt. sec. 90; Co. Litt. 67a, 30a. Then he may forfeit his estate for life by a felony, which, until issue born, he could not do, because his wife was the tenant. 2 Black. Com. 126; Roper, Hus. & Wife, 47. If the husband, after the birth of issue, make a feoffment in fee, and then the wife dies, the feoffee shall hold the land during the husband's life; because, by the birth of issue, he was entitled to curtesy, which beneficial interest passed by the feoffment. Co. Litt. 30a. If such feoffment is made before issue born, the husband's right to curtesy is gone, even though the feoffment be conditional and be afterwards avoided. And if in such case the husband and wife be divorced *a vinculo matrimonii*, the wife may enter immediately. Guneley's Case, 8 Co. Rep. 73. The husband's estate after issue born, will not be defeated by the attainder of the wife, for his tenancy continues, he being sole tenant. 1 Hale, P. C. 359; Co. Litt. 351a, 40a; Bro. Ab. Forf. 78.

The obvious conclusion from these views of the nature of the interest of a tenant by the curtesy initiate is, that such tenant is seized of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending upon the life estate of the husband. The necessary result of this is, that the wife cannot be prejudiced by any neglect of the husband, and, of course, she may bring

her action, or one may be brought by her heirs, at any time within twenty years after the decease of the husband, when his estate by the curtesy, whether initiate or consummate, ceases, and her right of action, or that of her heirs, accrues. In this respect there is no distinction between curtesy initiate and curtesy consummate. *Melvin v. Locks & Canals*, 16 Pick. R. 140.

So far as we are aware, this principle has never been questioned, where the inheritance of the wife has been conveyed to a third person either by a deed of the husband alone, or by a deed executed by a husband and wife, which from some defect did not bind the interest of the wife. *Miller v. Shackleford*, 3 Dana Rep. 289; *Caller v. Metzger*, 13 Serg. & Rawle Rep. 356; *Fagan v. Walker*, 5 Iredell Rep. 634; *McCorry v. King*, 3 Humph. Rep. 267; *Mellus v. Snowman*, 8 Shepley Rep. 201; *Meramon v. Caldwell*, 8 B. Mon. Rep. 32; *Gill v. Fauntleroy*, Ib. 177; *Melvin v. Locks & Canals*, 16 Pick. Rep. 140. But it has been held (*Melvin v. Locks & Canals*, 16 Pick. Rep. 161; *Kittridge v. Locks & Canals*, 17 Pick. Rep. 246) that where a disseizin has been committed upon the wife's estate, the disseizin is done alike to husband and wife; that a joint right of entry and of action accrues to both for the recovery of it, and that if such remedy is not prosecuted within twenty years, it is barred.

This is true where the husband has acquired no estate by the curtesy, and is seized merely in the right of the wife of her estate. Such are the cases of *Guion v. Anderson*, 8 Humph. Rep. 298; *Mellus v. Snowman*, 8 Shep. Rep. 201.

And if the husband is tenant by curtesy, as he and his wife are seized of the fee in right of the wife, the action must be brought by husband and wife, and a joint seizin in fee alleged in them in her right. Anon. Buls. 21. Their joint right of action is barred by the lapse of twenty years after it accrues. But it by no means follows that the reversionary right of the wife, accruing in possession after the estate of her husband has ceased, is also barred. It is well settled, that the same party may have several and successive estates in the same property, and several rights of entry by virtue of those estates, and one of those rights may be barred without the others being affected. *Hunt v. Burn*, 2 Salk. 422; *Wells v. Prince*, 9 Mass. Rep. 508; *Stevens v. Winship*, 1 Pick. Rep. 318; *Tilson v. Thompson*, 10 Pick. Rep. 359.

And every reason which can exist in favor of the right of any reversioner, applies equally in this case, namely, that a reversioner has, as such, no right of entry and no right of action during the particular estate, and consequently is not barred until twenty years after his own right of entry accrued. 2 Sugd. V. & P. 353; 3 Steph. N. P. 2920,

n. 10; 9 Mass. Rep. 508; 1 Pick. Rep. 318; 15 Mass. Rep. 471; 10 Pick. Rep. 359; 4 Johns. Rep. 390, before cited. Besides, the wife, by reason of her disability, can make no entry to revest her estate during the coverture. Litt. p. 403; Co. Litt. 246a. Coke says in express terms, "after coverture, she (the wife) cannot enter without her husband."

In *Jackson v. Johnson*, 5 Cow. Rep. 74, and *Heath v. White*, 5 Conn. Rep. 228, this question arose, and was decided in accordance with our views, and we think upon sounder principles than the case in Massachusetts, to which we have referred.

We have compared the provisions of the Revised Statutes with the older statutes, and do not perceive that there is, as to the point in question, any difference in their effect. Under neither would the plaintiff propose to claim any advantage from the proviso. His ground is not that the ancestor was a married woman when her right accrued, but that her marriage and the birth of one or more children had vested a life estate in her husband, and that the disseizin was done to him, and that no right of action accrued to her in virtue of the reversionary interest, under which her heirs now claim, until she became a widow, and the husband's estate had terminated; and that the action is brought within twenty years after that event. This appears to us a correct view of the case, and of the law; and the verdict must therefore be set aside, and a new trial granted.

### *Estates by the Entirety.*

#### HILES *v.* FISHER.

144 N. Y. 306.—1895.

A DEED of land running to "William R. Fisher, of the town and county aforesaid, and Maria J. Fisher, his wife," was executed in 1866. Later he gave a mortgage on his land to Hiles, as security for a loan made to him by Hiles, which mortgage was executed by Fisher alone. The mortgage was foreclosed and the premises were bid in by Hiles, but the defendants, Fisher and wife, refused to give possession. The General Term adjudged that, by the foreclosure sale, the plaintiff acquired the right to the possession of the whole property during the joint lives of Mr. and Mrs. Fisher, and to the fee in case the husband survived the wife.

ANDREWS, C. J. It was decided in *Bertles v. Nunan*, 92 N. Y. 152, that the separate property acts relating to the rights of married

women had not abrogated the common-law doctrine, that under a conveyance to husband and wife they take not as tenants in common, nor as joint tenants, but by the entirety, and upon the death of either the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife as survivor took upon the death of her husband the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the property conveyed to husband and wife during their joint lives, was not considered or decided upon, but was expressly reserved on the ground that it was not involved in the case then before the court. That question is involved in the present case and must now be decided.

The decision in *Bertles v. Nunan* is supported by the great weight of authority in other jurisdictions in this country, but in some of the states it has been held that as a consequence of the statutory provisions, substantially like those in this state, conferring upon married women the right to take and hold separate property to their own use, free from the control of their husbands, as *femes sole*, estates by entireties have been abrogated and turned into tenancies in common. In the states where this construction has been put upon the married women's acts, the questions of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits and use of his wife's real estate during their joint lives has been destroyed.

It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those states where it is held that notwithstanding the new legislation a conveyance to husband and wife retains its common-law character and incidents. If the right of the husband to the use during the joint lives of lands held under this tenure was a right growing out of and incident to this particular species of tenancy; in other words, if it was one of its specific and essential characteristics, then it would be difficult to segregate this right from the other rights incident to and flowing from the tenancy, and to say that while the estate by entireties continues this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usu-



fruct was not an incident of the tenancy, but of the marital right operating upon property so held, as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. 1 Bl. 182; Wash. on Real Prop. 425. Each is said to be seized of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant or tenant in common with him seems inconsistent with the doctrine which has finally obtained, that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in *Miner v. Brown*, 133 N. Y. 308, and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common that estate would be created. See, also, *McDermott v. French*, 15 N. J. Eq. 78; *Wales v. Coffin*, 13 Allen, 213; 1 Wash. on Real Prop. 425. There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common. See *In re March*, 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterwards. Coke on Litt. 187b. It would seem to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by the husband and wife as tenants by the entirety, in the aspect of its inseverability, has been adverted to. But it is important, in view of the subsequent discussion, to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seized of the whole, and not of any separate part. Neither could convey his or her interest to the prejudice of the right of survivorship in the other. The common-law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint lives. They were not regarded as having a joint seizin or a joint possession for the pur-

pose of the use during coverture. The husband was held to be entitled to the full control and to take the rents and profits of the land during the joint lives, to the exclusion of the wife, and he had power to sell, mortgage or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Id. 175; *Meeker v. Wright*, 76 N. Y. 262; *Bertles v. Nunan*, *supra*; *Ames v. Normand*, 4 Sneed, 683; *Pray v. Stebbins*, 141 Mass. 219. But the right of the husband at common law to take the rents and profits of lands held by him and his wife as tenants by the entirety, during coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband from the general principle of the common-law which vested in the husband, *jure uxoris*, the rents and profits of his wife's lands during their joint lives. 2 Kent Com. 130; Stewart on Husband and Wife, sec. 308. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate, whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife and subjected her person and property to the control of her husband.

In considering what effect, if any, the legislation in this state has had upon the right of the husband to the rents, profits and control of lands held by him and his wife in entirety, during their joint lives, it is important to regard not only the language, but the spirit of the new enactments. The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands, *jure uxoris*, during the joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all

the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of courts of chancery to secure to married women the enjoyment of their own property.

In determining the question now before us too much emphasis cannot be placed upon the fact that the legislation of 1848 and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife and the right to exclude her from its enjoyment. If it is still held, notwithstanding this legislation, that the husband takes the whole rents and profits during coverture in lands held in entirety, and may exclude the wife from any participation therein, an exception is allowed, standing upon no principle, and it deprives the wife, although she has an undoubted interest and estate in land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives. Either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in *McCurdy v. Canning*, 64 Pa. St. 39, or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in *Buttler v. Rosenblath*, 42 N. J. Eq. 651. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right, *jure uxoris*, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

The conclusion we have reached requires a reversal of the judgment below so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint lives of Mr. and Mrs. Fisher. The husband had a right to mortgage

his interest, which was a right to the use of an undivided half of the estate during the joint lives and to the fee in case he survived his wife, and by the foreclosure and sale the plaintiff acquired this interest and became a tenant in common with the wife of the premises subject to her right of survivorship. The opinion of the General Term exhibits with great clearness, the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words binds the fee in case he survives the wife. See 1 Wash. Real Prop. 425; 1 Prest. Est. 135; *Ames v. Norman*, *supra*.

The judgment below should be modified in accordance with this opinion and, as modified, affirmed, without costs to either party.

All concur except Haight, J., not sitting.

Judgment accordingly.

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### *Gifts and Conveyances between Husband and Wife.*

#### MOORE v. PAGE.

111 U. S. 117.—1883.

THIS was a creditor's bill to reach property conveyed by the debtor to his wife, and have it applied to the payment of the debt. The decree below sustained the conveyance, from which the creditor appealed.

MR. JUSTICE FIELD delivered the opinion of the court.

It is no longer a disputed question that a husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. The settlement may be made either by the purchase of property and taking a deed thereof in her own name, or by its transfer to trustees for her benefit. And his direct conveyance to her, when the fact that it is intended as such settlement is declared in the instrument or otherwise clearly established, will be sustained in equity against the claims of creditors. The technical reasons of the common law growing out of the unity of husband and wife, which preclude a conveyance between them upon a valuable consideration, will not in such a case prevail in equity and defeat his purpose. *Shepard v. Shepard*, 7 Johns. Ch. 57; *Hunt v. Johnson*, 44 N. Y. 27; Story's Equity, sec. 1380; Pomeroy's Equity, sec. 1101; *Dale v. Lincoln*, 62 Ill. 22; *Deming v. Williams*, 26 Conn. 226; *Maraman v. Maraman*, 4 Met. Ky. 84; *Sims v. Rickets*, 35 Ind. 181; *Story v. Marshall*, 24 Texas, 305; *Thompson v. Mills*, 39



Ind 528. Such is the purport of our decision in *Jones v. Clifton*, 101 U. S. 225. His right to make the settlement arises from the power which every one possesses over his own property, by which he can make any disposition of it that does not interfere with the existing rights of others. As he may give it or a portion of it to strangers, or for objects of charity, without any one being able to call in question either his power or right, so he may give it to those of his own household, to his wife or children. Indeed, settlements for their benefit are looked upon with favor and are upheld by the courts. As we said in *Jones v. Clifton*: "In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such relation to him as to create an obligation, legally or morally, to provide for them, as in the case of a wife, or children, or parents, the only question that can be properly asked is, does such a disposition of the property deprive others of any existing claims to it? If it does not, no one can complain if the transfer is made matter of public record and be not designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustees, whether it be direct conveyance from the husband, or through the intervention of others."

Whilst property thus conveyed as a settlement upon the wife may be held as her separate estate, beyond the control of her husband, it is of the utmost importance to prevent others from being misled into giving credit to him upon the property that it should not be mingled up and confounded with that which he retains, or be left under his control and management without evidence or notice by record that it belongs to her. Where it is so mingled, or such notice is not given, his conveyance will be open to suspicion that it was, in fact, designed as a cover to schemes of fraud.

In this case there was much looseness; and the transactions between the husband and the wife touching the property were well calculated to excite suspicion. It is, therefore, with much hesitation that we accept the conclusion of the Circuit Court. We do so only because of its findings that there was no deception or fraud intended by either husband or wife; that the appellants were not led to give any credit upon the property, but acquired their interest in the judgment which they are seeking to have satisfied, long after the transaction complained of occurred; that the title to the Dearborn avenue property was taken by mistake in his name, and that the mistake was rectified before this litigation commenced; that the bonds and notes in the bank which the creditors seek to reach represent the money advanced by her from the sale of that property for

the purpose of meeting an alleged deficit in his account as administrator of the estate of Maxwell, and in equity belong to that estate; that the money applied in satisfaction of the mortgage upon the Lincoln avenue property was part of the proceeds of that sale, and that she was entitled to have the conveyance to her from Mrs. Maxwell treated as security for that money. Such being the case, the creditors have no claim upon the bonds and notes superior in equity to that of the Maxwell estate, nor upon the Lincoln avenue property superior to that of the wife.

Decree affirmed.

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### DENIO, J., IN *WHITE v. WAGER*.

25 N. Y. 328, 329.—1862.

It is an established doctrine of the common law that, in consequence of the unity of person between husband and wife, neither the husband nor the wife can grant the one to the other, an estate in possession, reversion or remainder, to take effect in possession during the lifetime of the grantor. (Litt., sec. 168; Co. Litt., 3a, 112a; Hargrave's Note 12, and cases referred to; Bell on Property of Husband and Wife, 470; *Firebrass v. Pennant*, 2 Wils. 254; *Shepard v. Shepard*, 7 Johns. Ch. 57; *Voorhees v. The Presbyterian Church of Amsterdam*, 17 Barb. 103, and cases cited by Hand, J.; *Simmons v. McElwain*, 26 Barb. 419; *Dempsey v. Tylee*, 3 Duer, 73.) There are some exceptions to the rule not necessary to be adverted to here, but which will be found sufficiently stated in the treatise of Mr. Bell, at the place cited. The rule itself is one of those stubborn mandates of the common law which requires absolute obedience from the courts whatever they may think of the justice or equity of its application in a particular case. In the case referred to, from Wilson's Reports, where a provision by a husband for his wife was in question, the judges said they would be glad, if possible, to get over that maxim of law, that "a husband and wife are one person," and, therefore, cannot grant lands to one another. "But," they said, "we are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton, as to determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." The reporter adds that the *postea* was ordered to be delivered to the defendant, "*reluctante tota curia*." But it is, nevertheless, a very technical principle; and where the design is for a husband to convey to the wife, it may be evaded in various ways, as by a feoffment

to a third person to the use of the wife, or a covenant with a third party to stand seized to the use of the wife (*Bell, ut sup.*); or, where the wife desires to convey to the husband, the two may join in a conveyance to any one whom they can trust to convey immediately to the husband; and thus the title will be vested in him. *Merriam v. Harsen*, 2 Barb. Ch. 232.

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### BUSKIRK, J., IN *SIMS v. RICKETS*.

35 IND. 181, 192.—1871.

FIRST. None of the disabilities imposed upon a married woman have attached to the condition of a married man, who is as free to receive the title to the property and dispose of it after marriage as before, except that he cannot by his conveyance affect the inchoate right of the wife to his real estate.

Second. That a conveyance from a husband directly to his wife without the intervention of a trustee, is void at law.

Third. That a direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: 1. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit or that of their family, or which has been appropriated by him to his uses. 2. Where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the separate, sole, and exclusive use of his wife.

Fourth. Where a wife advances money to her husband, or the husband is indebted to the wife upon any valid consideration, the wife stands as the creditor of her husband, and if the conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, where the transaction is unaffected by unfairness or fraud.

Fifth. Whenever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity, when made with each other, without the intervention of trustees.

Sixth. That prior to the recent legislation in this state authorizing married women to hold real estate to their separate use, when a conveyance was made by a stranger to a married woman, or to a trustee for her, in order to give her a separate use in the property, it was necessary that such conveyance should contain words clearly indicating such intention, but such words were unnecessary in a con-

veyance from a husband to his wife, for the law presumed that it was intended for her separate and exclusive use.

Seventh. That section 5 of an act entitled "an act touching the marriage relation and liabilities incident thereto" (approved May 31st, 1852), made all property held by a married woman at the time of her marriage, or acquired by her subsequently, hers absolutely, and has enabled her to use, enjoy and control the same independently of her husband and as her separate property; and that since the passage of that act a conveyance to a married woman need not contain words indicating that she is to hold the property to her separate use.

Eighth. That when conveyances from a husband to his wife have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty, as that they were not in the nature of a provision for the wife, or when they interfered with the rights of creditors, or when the property given or granted had not been distinctly separated from the mass of the husband's property.

Ninth. That in consequence of the absolute power which a man possesses over his own property, he may make any disposition of it which does not interfere with the existing rights of others.

Tenth. When a husband is free from debt and has no children, and conveys property to his wife for a nominal consideration, the law will presume that it was intended as a provision for his wife.

Eleventh. That a conveyance from a husband to his wife which is good in equity vests the title to the property conveyed in the wife as fully, completely and absolutely as though the deed had been made by a stranger upon a valuable consideration moving from the wife.

It appears by the record in this case that the grantor was possessed of a large property; that in his will he disposed of about \$8,000 in specific legacies; that the value of the property disposed of in the residuary clause is not shown; that he had no children, and if he had died intestate, his wife would have inherited his entire estate; that the rights of creditors were not interfered with by the conveyance in question; that the great and commendable anxiety displayed in his will for the welfare, comfort and happiness of his wife tends to show that the conveyance which he had made a short time before was intended as a provision for his wife; and that in making his will he had such conveyance in mind, and did not intend to devise to his brothers and sisters the property which he had previously conveyed to his wife.

We are clearly of the opinion that the conveyance in question was good in equity and should be sustained.



*Devises and Bequests by the Wife.*VAN WINKLE *v.* SCHOONMAKER.

2 McCART. (N. J. EQ.) 384.—1862.

THE ORDINARY. The appeal is from a decree from the Orphans' Court of Bergen county, admitting to probate the will of Mary D. Van Winkle, the wife of the appellant. The will disposes of both real and personal estate of the testatrix. It is dated on the 1st of February, 1859, and was offered for probate on the 24th of March, ensuing, and on that day a *caveat* was filed by the husband against the probate.

It appears, from evidence, that the scrivener was requested, by the husband of the testatrix, to write the will, and was furnished by him with instructions for that purpose. After the death of the testatrix, a day was fixed for the reading of the will at the house of the husband. Notice was given by him to the heirs of his wife, and the will was read there in his and their presence. He knew of its being taken to the surrogate's office for probate, and made no objection to it.

At the time the will was executed, both the scrivener and the husband of the testatrix supposed that she had a legal right to dispose of her property, real and personal, by will. The mistake was not discovered until the will was taken to the surrogate's office for probate. The fact of the testatrix being a married woman appearing upon the face of the will, the surrogate suggested doubts in regard to its validity. He told the parties, however, that the matter might be arranged, the heirs of the testatrix being of age, by their releasing to the devisee the land devised to her under the will. The husband consented to the probate of the will, if the devises, as well as the bequests, could be carried into effect. The heirs refused to consent to the proposed arrangements, and thereupon the husband filed a *caveat* against the probate. The testatrix and her husband having been married over twenty years, the case stands entirely clear of the operation of the act of 1852 for the better securing the property of married women.

As to the real estate, the will is clearly invalid. A married woman is incapable of devising real estate. 2 Bla. Com. 498; Nix. Dig. 874, sec. 3.

She is also incapable of disposing of her chattels by will without the consent of her husband. Such a will, being a mere nullity, will not be admitted to probate. 3 Bla. Com. 498; 4 Coke's Rep. 51b; 1 Williams on Executors, 45.

But with the consent of her husband, the wife may make a valid will of her personal estate, or even of the goods of her husband. Such consent may be by parol, may be express or implied. It may be before or after the death of the wife, as if a woman makes a will of the goods of her husband and dieth, and after the probate of the will the husband delivers the goods to the executor, he hath made it a good will, notwithstanding he was not privy to the making thereof. It shall be intended, that by the delivery of the goods by the husband to the executor according to the will, he assented to the making thereof. Perkins on Conveyances, "Devises," ch. 8, sec. 501; 1 Swinb. on Wills, 80, part 2, sec. 9.

In the case now under consideration, the will was made with the knowledge and consent of the husband of the testatrix. His consent was given by implication, both before and after the death of the testatrix. But it is objected that the consent is inoperative, because it was given by the husband under a mistaken apprehension of his rights. He believed that his wife had a perfect right, under the act of 1852, to dispose of her property without his consent. No consent, therefore, it is said, can be implied from his acquiescence. Even his express consent, to be available, must be an intelligent consent. However consonant the objection may seem to our ideas of justice, I do not perceive upon what principle it can rest. As a general rule, it is clear that a party cannot be relieved, even from his contract, by reason of a mistake in law. Here is a mere waiver of his interest in the property bequeathed by the wife. The husband consents that the wife shall dispose of his property, or of her property in which he has an interest. The consent is founded upon no consideration. It is not legally binding. It may be revoked at the husband's pleasure. It is personal to the husband, and no more than a waiver of his rights as her administrator. It can only give validity to her will in case he survives his wife. But how can it be said to be void or inoperative by reason of a mistake of his rights? If no legal rights have been acquired under the consent, it is clearly inoperative. If such rights have been acquired, it is not perceived how they can be lost by reason of an error in law committed by the husband.

It is further objected that the consent is inoperative, because it was a qualified assent—an assent to the will as an entirety, valid in all its parts. This qualification was in terms annexed to the consent made, at the surrogate's office, to the probate of the will. But no such qualification was annexed, in terms at least, to the original assent made to the will at the time of its execution. If this consent could be regarded as a matter of contract—if, for example, the husband, by an express agreement consents that the wife shall dis-

pose of her entire estate by will, provided she bequeaths one-half of it for his benefit, or in such mode as he should suggest, the failure to comply with the terms might terminate the consent. But it is not perceived how this doctrine is to operate in case of an implied consent. And if the husband consents that the wife may dispose of all her property by will, that consent cannot be invalid because a part of her property is by law incapable of being disposed of by will. There is, in fact, no room for the application of either of these objections. The consent is not obligatory, but is revocable at the pleasure of the husband at any time before probate granted. It is nothing more nor less than a consent that the will be admitted to probate. If that is revoked, probate cannot be granted. 2 Swinb. on Wills, 81, part 2, sec. 9; *Henly v. Phillips*, 2 Atkins, 49; 1 Roper on Husb. and Wife, 170; 1 Bright on Husb. and Wife, 65; 1 Williams on Ex'rs, 46; 1 Jarman on Wills, 31.

Some of the cases seem to maintain a different doctrine. *Brook v. Turner*, 2 Mod. 172.

It is reported to have been held by Sir H. Jenner Fust, in *Maas v. Sheffield*, that if after the death of the wife the husband does assent to a particular will, he is bound by that assent; and as a consequence of that decision, it is stated by elementary writers, that if, after the death of the wife, the husband acts upon the will or once agrees to it, he is not, it seems, at liberty to retract his assent and oppose the probate. 1 Williams on Ex'rs, 47, and note w; 1 Bright, 65, and note d. As applied to a particular state of facts, that may be true. If, for instance, the executor, in advance of the probate, with the assent of the husband, dispose of the property bequeathed to third persons, or if rights are otherwise acquired under the will, it may well be that the husband would not be permitted to retract his assent and oppose the probate. But this will be found not to affect the general principle that the consent is revocable by the husband at any time before probate.

The decree of the Orphans' Court must be reversed.

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### *The Wife's Earnings.*

PRESCOTT *v.* BROWN.

23 ME. 306.—1843.

SHEPLEY, J. The plaintiff, being the widow of David Prescott, deceased, brings this suit to recover for services performed in washing for the defendant, while she was a *feme covert* residing with her husband.

The counsel for the plaintiff contends that, she being the meritorious cause, an action might have been maintained for those services in the name of the husband and wife during the life of the husband. And that, when the wife may be joined, the cause of action survives to her. The elementary writers cited appear to sustain these positions, with this qualification, that she may be joined, when the cause of action being for her personal labor, there is an express promise to her. In the case of *Pratt & ux. v. Taylor*, Cro. Eliz. 61, an action by husband and wife was maintained on an express promise to the wife by the defendant, that he would repay to her, if he did not marry her daughter, ten pounds, which he had before received from her. In the case of *Brashford v. Buckingham & ux.*, Cro. Jac. 77 and 205, the action was sustained by a husband and wife, on the promise made to the wife to pay her for her services in curing a wound. And in *Weller v. Baker*, 2 Wil. 424, this case is approved, and it is stated, that a like doctrine was held in the case of *Holmes & ux. v. Wood*. And it is stated by Comyn, that where the wife cannot have an action for the same cause, if she survives her husband, the action shall be by the husband alone. Com. Dig. Baron and Feme, W. In *Buckley v. Collier*, 1 Salk. 114, it was decided that the husband and wife could not maintain an action for the labor of the wife in making a peruke, without an express promise to the wife. If these authorities were admitted to state the law in all respects with entire accuracy, the result would seem to be, that the wife, surviving her husband, would have the right to recover for her personal labor, performed for another during the coverture, if payment had not been made to the husband, and to apply the proceeds to her own use, if she could prove an express promise to herself. And her right of property in such personal labor would depend upon her obtaining such a promise.

By the common law the service and labor of the wife during coverture becomes the property of the husband for their support, for which he is bound to provide. It is difficult to perceive how she can be said to have a property in such personal labor, which survives to her, when the right of property therein was appropriated to the husband by the marriage. And in the case of *Buckley v. Collier*, it is said, "the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband." And no case has been noticed in which a different doctrine has been held. But whatever may be the rule of law in this respect, the plaintiff cannot maintain this suit without proving an express promise to herself, and the testimony does not furnish any such proof.

Plaintiff nonsuit.<sup>1</sup>

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<sup>1</sup> See also *Boozar v. Addison*, *ante*, p. 121.



*The Wife's Separate Estate in Equity.*

NIX v. BRADLEY.

6 RICH. EQ. (S. C.) 43.—1853.

DARGAN, Ch. There are three modes of disposition, by which a separate estate may be created in favor of a married woman. First, where technical words are employed; as in instances where the estate is given for "the sole and separate use of the wife." Second, where the estate is not given after this form, but the marital rights are excluded by express words. For example, where an estate is given to the wife, but not to be subject to the power, control or liabilities of the husband; or, where the marital rights are restricted by words of a similar import. Third, where the marital rights are excluded by implication; as in instances where, by the instrument creating the estate, the wife has the power to do acts, to exercise a control, and to make disposition of the property, which are inconsistent with the marital rights. It is thought that the most, if not all, the cases of this description may be brought within one or the other of these classifications.

The testator, David Cave, by his will, directed all his estate, real and personal, to be sold by his executors. One sixth part thereof he gave to his son Matthiew Cave, absolutely, and for ever. He then proceeds to declare as follows: "The other remaining five parts of my property, real and personal, I bequeath to my son Matthiew Cave, in trust nevertheless, for the use, benefit and interest of my daughters, Dorcas Kirkland, Elizabeth Nix, Martha Cave, Nancy Cave and Mary Cave, in equal proportions, share and share alike, and not subject to the debts, contracts, or sale of their present, or future husband." This constituted a separate estate in the testator's daughters under the second classification of such cases above enumerated.

In January, 1835, the testator's land and some of the personal estate was sold for the purpose of partition. And a division was made among the parties entitled, of the remaining chattels, including the negroes. The presiding chancellor in his report of the case states that, "on the 11th February, 1836, Martha Cave, (then *sui juris*), gave Matthiew Cave a receipt for \$768.69, in full of her share; with a schedule prefixed, showing that she received a slave named Peter, at \$550, cash \$50, and other articles mostly consumable in the use. In April, 1835, Martha Cave sold Peter to Jesse Nix for \$600; and in April, 1835, purchased from A. J. Nix for \$650, two slaves, Chloe

and her child Richard and took a bill of sale in her own name. Chloe has since had four children, Cuffee, Bob, Adam and Nancy. On the 6th December, 1838, the defendant Robert Bradley intermarried with Martha Cave, she being then about thirty-two years of age. At the time of the marriage, according to the responsive statements of the answer (and there was no opposing evidence), she was possessed of the two slaves, Chloe and Richard, a horse, about eight head of hogs, seven cattle, and two beds and furniture, and nothing more. And all of these chattels, except the two slaves, have long ago been dead, or consumed in the use. The defendant admits that after the marriage he received certain small sums of money, appearing by proof, to be about \$300: represented to be on account of his wife's share of her father's estate; but alleges that the whole was expended during the coverture. It further appears that the defendant received from Matthew Cave, chattels valued at \$32 and money to the sum of \$175, as his wife's share of the estate of Nancy Cave, one of the testator's daughters who died without issue; also the sum of \$34.40, in full of the share of himself and wife in the estate of John Cave, deceased, who is stated, but not proved, to have been a debtor of the testator." Martha Bradley died 29th June, 1851, and the plaintiff, A. J. Nix, administered on her estate in January, 1852. This bill was filed on 11th May, 1852.

The plaintiffs claim from the defendant on account of the estate which his deceased wife, Martha Bradley, derived under her father's will, on the ground, that it was her separate estate, upon which the marital rights did not attach; and that Martha Bradley dying intestate, said estate was distributable among her next of kin under the statute of distribution. I have already shown that the estate which Martha Bradley derived under her father's will was, in its inception, her separate estate. But there may be a fee in an equity as well as in a legal estate; and Martha Bradley took an absolute interest in the equity. There was no limitation or remainder. The plaintiffs had no estate in the property, and they can only claim in the way of succession by or through her.

The question then occurs can a *feme sole*, who is *sui juris*, alienate her separate estate? Can she encumber it? Can she subject it to the payment of debts; devise or bequeath it? Can she make any disposition of it which a man, under similar circumstances would be authorized to make? There cannot be a doubt, that on both principle and authority, all of these questions must be answered in the affirmative. One of the most valuable incidents in the institution of property, is the right of alienation; and no citizen of the country, male or female, who is under no disability, can be restrained in the

exercise of the right, without a violent assault upon the very nature of the institution. There is no form of conveyance which ingenuity can devise, by which a man, who is under no disability, can have property without the power to convey and assign his right, whatever that may be. The same principle applies in full force, and all the reasoning on which it is founded, to a *feme sole* under the like circumstances. *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Pocock*, 2 Russ. & M. 210; s. c., 5 Sim. 663; *Jones v. Salter*, 2 Russ. & M. 208; *Barton v. Briscoe*, Jac. 603. The married woman is secure in the enjoyment of her separate estate, without the power of alienation, and of subjecting it to payment of her debts on the ground that she is under the disability of coverture, and can make no contracts, or assignments that are binding upon her estate, further than is authorized by the instrument creating it. If these views be not correct, a *feme sole* with a separate estate, though it be in fee, would be denied the enjoyment of her property with the incidents belonging to it, and which make it valuable. She would not be able to devise, bequeath, sell or give it, though she lived in single blessedness to the end of her life. There is no reason in such a restraint upon the rights of property.

The authorities which I will now cite abundantly show that I have not stated the principle too strongly. "It is, at length, clearly established," said Mr. Lewin, "that a *feme sole* may dispose absolutely of a gift to her separate use; and the principle is briefly this, that whenever a person possessing an interest, however remote, is *sui juris*, that person cannot be restrained by any intention of the donor, from exercising the ordinary rights of proprietorship." Lew. on Trust, 151. Sir Edward Sugden, in treating of a woman's power over her separate estate, prior to marriage, says, "her power of alienation, while discover, is denied by none." 1 Sugden on Powers, 202. Mr. Bell says, "if property be given to the separate use of a woman who is not married at the date of the gift, with a clause in restraint directed against any future marriage, she will have all the rights of a *feme sole*, and an absolute ownership while she continues *sole*. And upon her application, the property will be transferred to her absolute use." Bell on the Property of Husband and Wife, 508. Mr. McQueen says, "as the separate use cannot exist but in the married state, so neither can restraint upon anticipation. There is no form of limitation whereby a single woman can be prevented from squandering her income, or dissipating her money. If, then, property become invested in her while discover, although the instrument may express that the gift is to be to her separate use, and subject to restraint upon alienation, she may nevertheless dis-

pose of it absolutely; because property cannot be given to a *feme sole*, any more than to a man, without being subject to the incidents which property implies; and one of these is the unlimited power of disposal." 1 McQueen on Husband and Wife, 313. In *Tullett v. Armstrong*, 1 Beav. 1; S. C., 4 My. & Cr. 390, Lord Langdale held, that the alienation of her separate estate by a *feme sole* was valid. "The restraint," he says, "is annexed to the separate estate only during coverture. Whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage." This decision was on appeal affirmed by Lord Cottenham, 4 My. & Cr. 405. Sir John Leach twice held that a woman, while sole, could not assign her separate estate; and in both cases his decisions were reversed by Lord Brougham, who held that the assignments were valid. 1 Sug. Pow. 202. (*Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Pocock*, 2 Russ. & M. 210.)

It is clear, therefore, that all the dispositions which Martha Bradley made of her separate estate before her intermarriage with the defendant are valid, and did not constitute any separate estate in her at the time she entered into the coverture. And this includes Chloe and Richard, and the other issue of Chloe. She sold Peter, as she had a right to do. With the purchase money of Peter, the chancellor says, (he is satisfied from the evidence), she bought Chloe and Richard. But she took the title in her own name, discharged of all trust, or restriction, thus renouncing the separate estate. These negroes were never a part of the separate estate, and the marital rights attached upon them. But the chancellor says, "the defendant admits that, after the marriage, he received several small sums of money, appearing by proof to be about \$300, represented to be on account of his wife's share of her father's estate; but alleges that the whole was expended during the coverture."

Upon this state of facts, the question is raised, whether the separate use does not continue as to that portion of the estate which was not disposed of by the wife while sole, and which was received by the husband after the marriage? And if so, is the husband who has received the same liable to account? It is asked with much plausibility and force, if the woman, while sole, can sell or even give away her separate estate, why may not the husband take it as a purchaser for valuable consideration? "Has the court any authority to alter the nature of that property on her subsequent marriage, and limit the gift so as to exclude the rights of the husband?" Coleridge Sol. in *Tullett v. Armstrong*, 1 Beav. 11.

The principle asserted in the foregoing proposition is not without



the support of authority. *Massey v. Parker*, 2 My. & K. 174; *Newton v. Reid*, 4 Sim. 141. It seems at no late day to have been a disputed question in the English Court of Chancery. 1 Mad. Ch. 473; *Pawlet v. Delaval*, 2 Ves. Sen. 679; *Clinton v. Hooper*, 5 Bro. C. R. 201; *Lynn v. Ashton*, 1 Russ. & M. 188. It would be proper here to remark that between the law of England and that of South Carolina there is an important distinction as to the power of a married woman over her separate estate. Whilst in the former country the wife has all the rights incident to property, with the absolute power of disposal, even in favor of her own husband, except so far as she is restricted by the instrument which creates the estate; in this state, the wife having a separate estate, has, during coverture, no power of alienation over the property further than she is authorized by the instrument under which she derives it. Without bearing in mind this distinction, the English cases upon this interesting subject will not be so well understood. Thus they hold there that a married woman, having a separate estate without any restraint upon the power of disposal, may do with it as she pleases; may exercise all the rights of ownership. It is otherwise where there is a restraint upon alienation. In such instances, the wife, in her use of the estate, must conform to the conditions which the restraint imposes upon her. It is the latter class of cases that will apply in questions arising in our courts, where the restraint exists in all cases of separate estate where power is not given to the wife; and such restraint is implied from the nature of the estate. In *Squire v. Dean*, 4 Bro. C. C., 326, it was held, that if the husband is permitted by the wife to receive her separate estate, and it is applied to the maintenance of the family, she will be presumed to have assented to such application of it. And in *Beresford v. The Archbishop of Armagh*, 13 Sim. 643, it was held, that if the husband receives the wife's separate estate, and the fact be known to the wife without the assertion of any claim or objection on her part, a gift to the husband will be presumed.

The defendant, Robert Bradley, says, by way of defense, that the portion of the separate estate of his wife received by him was expended during the coverture. It does not appear that it was expended in support of the family; nor by the express or implied assent of the wife. And even by the English case the husband, under such circumstances, would be held to account on the death of the wife. But conceding that it was satisfactorily proved, that the property was expended for the support of the wife, or was actually given by her to the husband, or to a stranger, the principle of the class of cases last referred to will not apply in this state. Those are

cases in which the wife's power over her separate estate was not restricted. They are not in point here, where the wife can in no case sell, or give, her separate estate, unless it be coupled with a power of disposal, or appointment to uses.

When a *feme sole* has a separate estate, with restraint upon alienation, in England, or without it in this state (where the restraint is always implied), though the restriction be suspended, and the power of alienation exists unfettered, while she is a discover, as soon as she marries, the restraint is called into activity, and operates to the exclusion of the marital rights. This doctrine was fully recognized in *Tullett v. Armstrong*, 1 Beav. 1. And on appeal it was affirmed by Lord Cottenham. s. c., 4 My. & Cr. 377, 392. It would seem, however, that "the moment she becomes again single, the separate use, and the restraint in anticipation, will both cease, though still capable of revival, and subject to extinction, upon subsequent marriages, and subsequent discoveries, *toties quoties*." McQ., H. & W., 314; *Jones v. Salter*, 2 Russ. & M. 208; *Barton v. Briscoe*, Jac. 603. In *Clark v. Jacques*, 1 Beav. 36, an annuity was given by will to Sarah Grace Hitchcock, who was a *feme sole*, at the death of the testator, to her separate use, and with a restraint upon alienation. After the death of the testator, Sarah Grace Hitchcock intermarried with Thomas Jacques, who died leaving Sarah Grace surviving him. She afterwards intermarried with Richard Hitchcock. The said Richard Hitchcock and Sarah Grace Hitchcock having sold the annuity to one Ireneus Mahew, united in a petition to the court for a confirmation of the sale. No disposition of the annuity was made while she was discover. Lord Langdale, master of the rolls, refused the petition, holding that the separate use with restraint against alienation attached upon the estate during the second coverture. See *Scarborough v. Borman*, 1 Beav. 34; *Dixon v. Dixon*, 1 Beav. 40.

The reason why a *feme sole* having a separate estate, even with a restraint upon alienation, may sell, or give it to a stranger, and yet the husband may not take it as a purchaser upon the valuable consideration of marriage, has been placed upon various grounds. The distinction is anomalous. By some it has been attempted to be based upon the assent tacitly given by the husband when he marries a woman with a separate estate. Lord Cottenham in *Tullett v. Armstrong*, 4 My. & Cr. 404. But as reasoned by his lordship, resting the claim of the wife upon such assent of the husband, it is assumed that without such assent it would not exist. Neither could the assent of the husband be implied without notice of the settlement, and thus would be raised an issue of fact as to the notice in

almost every case. Based upon such grounds, the protection which this court could give to the separate estates of married women would be very inadequate and uncertain. Others have supposed the title of the husband as a purchaser to be defective, because the title is not consummated until the solemnization of the marriage; after which, the wife is incompetent to contract, or to confer title, by reason of the coverture. This reason is also illogical and inconsistent; for by the same process of reasoning it could be shown that the wife would be incompetent by her marriage to confer title upon her husband of her chattels in possession. The doctrine must be allowed to be an anomaly—an exception to the usual incidents of property—a creature of the court of equity, adopted for the preservation of the separate estates of married women, without which they would, in many instances, be endangered and destroyed by the marital power and influence. It is surely within the competency of a court, where the idea of separate estates originated, and where rights under them are enforced, contrary to the rights of the husband as recognized in courts of law, to modify the rules regulating such estates, and to amplify their defences, so that they may be effectually preserved for the purposes for which they are created. Besides this, the aim of the donor in creating a separate estate is always directed against the marital rights. Without marriage, no such estate would be created; neither could it be. It can only exist in the marriage state; for, otherwise, it has no meaning. The court, therefore, simply carries out the intentions of the donor, and the purpose of this institution, when it considers a *feme sole* competent to dispose of her separate estate while she is sole; and if not so alienated, in disallowing the marital rights of the husband after the marriage.

The sum for which the defendant will be responsible, under the foregoing principles, will be small; not exceeding \$300, if so much. The solicitor for the defendant, in this branch of the case, has quoted the law maxim, "*de minimis non curat lex.*" The maxim has never applied to money demands. Nor do I know that the sum in controversy would be regarded by the parties claiming it as insignificant. Be this as it may, we are not at liberty to withhold a remedy for the enforcement of any claim, however small, which is presented in proper form, and to which the party claiming is entitled by the law of the land.

It is ordered and decreed that the circuit decree be modified. It is further ordered that the defendant is liable to account to the administrator of his deceased wife, Sarah Bradley, for all sums of money and choses in action; also, for all other property of the tes-

tator, other than that which was consumed in the use, and which have come into the hands of the said defendant during his coverture with the said Sarah Bradley; together with interest upon the value of the same from her death. It is further ordered and decreed, that the commissioner take an account of the same, and report to the Circuit Court. In all other respects it is ordered and decreed, that the circuit decree be affirmed, and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.

JOHNSTON, Ch., absent at the hearing.

Decree modified.

## SPENCER, C. J., IN JACQUES v. METHODIST EPISCOPAL CHURCH.

17 JOHNS. (N. Y.) 548, 578.—1820.

THE question is whether Mrs. Jacques, with respect to her estate, is not to be regarded in a court of equity as a *feme sole*, and may not dispose of it as she pleases, without regard to her trustee; there being nothing in the deed of settlement requiring the consent or concurrence of her trustee, nor any negation of an unlimited power of disposition of the estate by her.

I have examined this case with the unfeigned respect which I always feel for the learned chancellor, who has denied the right of Mrs. Jacques to dispose of her estate, without the consent or concurrence of her trustee; and I am compelled to dissent from his opinion and conclusions. From the year 1740, until 1793 (with the single exception of the opinion of Lord Bathurst in *Hulme v. Tenant*, which occurred in 1778, and in which case a rehearing was granted by Lord Thurlow, and the opinion reversed), there is an unbroken current of decisions, that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate. There were nearly twenty cases decided by Lord Hardwicke and Lord Thurlow, containing the principle I have stated, and which I shall not weary the patience of the court by citing. The case of *Sockett v. Wray* (4 Br. Ch. C. 483), before Sir R. P. Arden (Master of the Rolls), in 1793, was the first case to break the continuity of decisions. This formed a precedent for the case of *Hyde v. Price* (3 Vesey, jun. 437), then followed the cases of *Whistler v. Newman* (4 Vesey, jun. 129), and



*Mores v. Huish* (5 Vesey, jun. 692), decided by Lord Loughborough. In *Whistler v. Newman*, Lord Loughborough admitted that the cases had gone the length, and that he was bound by them, that if a married woman has separate property, she may dispose of it, and the trustees were bound to follow her disposition. In *Mores v. Huish*, his lordship distinguished it from the preceding cases. These cases are succeeded by many others, after Lord Eldon became chancellor, in which he restored the law to its first and ancient principle. In the case of *Parkes v. White* (11 Vesey, jun. 209), he reviewed all the cases, and strongly intimated, that the decision in *Whistler v. Newman* was in opposition to all the authorities for a century. He laid down the rule to be, that a married woman, having an estate to her separate use, is capable of disposing of it, provided the transaction is free from fraud, and no unfair advantage is taken of her.

The mistake into which I think the chancellor has fallen, consists in considering Mrs. Jacques restrained from disposing of her estate in any other way than that mentioned in the deed of settlement. The cases, in my apprehension, are clearly opposed to this distinction; and I am entirely satisfied, that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, when there is no fraud or unfair advantage taken of her, the court of equity will apply it to the satisfaction of such an engagement. This was the principle adopted by Lord Hardwicke, in *Grizby v. Cox* (1 Vesey, senr. 517), and the same doctrine prevailed in *Pybus v. Smith*, *Ellis v. Atkinson*, and in *Newman v. Cartony* (3 Br. Ch. C. 340, 346). In *Pybus v. Smith*, Lord Thurlow observed, if a *feme covert* sees what she is about, the court allowed of the alienation of her separate property. The same principle was adopted in *Fettiplace v. Gorges* (3 Br. Ch. C. 8; 1 Vesey, jun. 46), and in *Wagstaff v. Smith* (9 Vesey, jun. 520.) It seems to me that the power reserved to Mrs. Jacques, by the deed, has been misconceived; I understand it, that during her life, her estate is to be at her absolute disposal, with a further power to grant and devise it by her last will and testament; but if the power of disposition was specifically pointed out, it would not preclude the adoption of any mode of disposition, unless there were negative words restraining the exercise of the power, but in the very mode pointed out.

Chancellor Dessausure, in 3 Equity Reports of cases determined in South Carolina, p. 427, has, with great ability, examined all the cases upon this subject, and arrived at the conclusion I have formed. It is true that his opinion, and that of Chancellor Thompson, who

concurred with him, were overruled by the three other chancellors, but it was on the express ground that the question was *res nova* in that state, and that they were not bound by decisions in England in consequence of colonial statute of 1721. And those who differed in opinion from Chancellor Dessausure, admit that his opinion was in conformity with the English decisions.

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### COONEY *v.* WOODBURN.

33 MD. 320.—1870.

ALVEY, J. The question in this case arises upon the effect of a clause in the will of Patrick Cooney, who died in September, 1849. The will was made in April, 1849.

The testator left several children surviving him, and among them Eleanor B., the appellant's intestate, to whom was bequeathed, by her father, certain leasehold property in the city of Baltimore, for her sole and separate use and benefit, without being subject to the control or disposal, or liable for the debts, of her husband, if she should thereafter marry; and such of the testator's property as passed to his daughter Eleanor B., under the residuary clause of the will, was also declared to be for her sole and separate use and benefit, independent of the control or disposal of her husband, if she should marry. At the time of the death of the testator, the daughter, Eleanor B., was unmarried; but she became possessed of the property bequeathed to her by her father's will, and in August, 1854, was married to Charles H. Woodburn, the testator of the appellees. She died intestate, and without issue, in 1864, her husband surviving her. Her property was all taken possession of by the surviving husband, without administration; and in August, 1866, he died, leaving a will, by which he gave his property to his mother, one of the appellees, and David E. Woodburn, his brother, became administrator of his estate. In 1867, George A. Cooney, the appellant, obtained letters of administration upon the estate of his sister, Eleanor B. Woodburn, and in his character of administrator claimed the property that had been bequeathed to his intestate by her father, and which had passed into the possession of her surviving husband at the time of her death. The bill in this case is filed to enforce that claim. And the single question argued on this appeal is, whether the personal property of the wife limited to her sole and separate use by her father's will, passed, upon her death intestate and without issue, to her husband, in his own right, or to her administrator?

It is contended on the part of the appellant that, according to the intention of the testator, as manifested in the terms of his will, the daughter took the estate bequeathed to her as *feme sole*, and that she bore that relation to it during life, notwithstanding her marriage, and that all the marital rights of the husband were excluded, as well after the death of the wife as before, and that, consequently, the property devolved on the appellant as administrator of the wife; while on the part of the appellees it is contended that during the coverture the marital rights of the husband in the property were only suspended, and that upon the death of the wife, the separate quality of the property ceased, and the marital rights of the husband attached, as if the separate use had never been declared.

In determining the question it is important to observe the terms in which the bequests were made. They gave the property to the legatee, then a single woman, for her sole and separate use, without being subject to the control or disposition of her future husband, but without any limitation over whatever, or the employment of any terms to indicate how the property was to pass on the death of the daughter; nor is there any limitation as to the mode of assignment or appointment. The legatee was clothed, therefore, with general power of alienation as *feme sole*, both before and after marriage. *Cooke v. Husbands*, 11 Md. 492.

The separate estate, the mere creature of a court of equity, is allowed and maintained for the benefit and protection of the wife, against the improvidence and misfortunes of the husband, and consequently it has its existence and operation only during the period of coverture; and whilst the legatee in this case remained discover the separate estate was dormant and without effect, though it was capable of arising, and did arise, upon the happening of the marriage contemplated by the will; and upon the termination of the coverture upon the death of the wife, such separate estate became absolutely void. *Tullett v. Armstrong*, 1 Beav., 1; s. c., on appeal, 4 Myl. & Cr. 397.

It was certainly competent to the testator to have not only excluded the marital rights of the husband during the coverture, but, by apt terms, to have carried such exclusion beyond that period, and excluded them altogether. There is nothing, however, in the terms of the will to manifest clearly such intent. The husband is the party declared by law to be entitled in the absence of some clear and positive limitation to exclude him, and if the separate estate terminated with the death of his wife, and there be no limitation of the estate inconsistent with the rights of the husband, who other than the husband can be entitled? His rights were simply suspended,

in reference to this particular property, during coverture. It is true, the property could have been disposed of by the wife by virtue of the existence of the separate estate, and thus the husband's suspended rights could have been entirely defeated; but that not having been done, upon the death of the wife, those rights were revived and became active.

It being conceded that the husband would be entitled to the property in question, if it were not for the effect attributed to the will of Patrick Cooney, it becomes purely a question of construction; and as there is nothing on the face of the will, apart from the usual formula of declaring the separate estate during coverture, it follows that the husband's rights, though suspended up to the time of the death of the wife, have not been entirely defeated. The will making no disposition of the property on the death of the wife, and providing only for her exclusive dominion over it during coverture, "the right of the husband, as survivor, is a fixed and stable right, over which the court has no control, and of which he cannot be divested. The settlement cannot be extended, by construction, beyond the just and fair import of its provisions; and, clearly, the court cannot create a settlement or disposition of property, in violation of the *jus mariti* when none has been made by the party." So declared Chancellor Kent, in the case of *Stewart v. Stewart*, 7 Johns. Ch. Rep. 229; and the reasoning and principle of construction of that case have been fully sanctioned and approved of by the courts of this state, in *Ward v. Thompson*, 6 Gill & John. 357; *Waters v. Tazewell*, 9 Md. 291, and *Jones v. Brown*, 1 Md. Ch. Dec. 191; which cases govern and control this.

Being of opinion that the surviving husband was entitled to the personal property of his wife at the time of her death, we shall affirm the decree appealed from, with costs to the appellees.

Decree affirmed.

### JOHNSON v. VAIL.

14 N. J. Eq. 423.—1862.

THE bill is filed on behalf of a married woman, by her husband and next friend, for an injunction to restrain an execution creditor of the husband from selling and disposing of property claimed to be the separate estate of the wife.

THE CHANCELLOR. \* \* \* 1. It is objected that the husband is a necessary party to the bill. The bill is exhibited and sworn to



by the husband as the next friend of the wife; but he is not joined as a party in the bill, either as complainant or defendant. He cannot legally be joined as complainant, his interest, which is claimed by the defendant, being adverse to that of his wife. Persons having adverse or conflicting interests in reference to the subject-matter of the litigation ought not to join as complainants in the suit. *Davies v. Quarterman*, 4 Younge & Coll. 257; *Grant v. Van Schoonhoven*, 7 Paige, 257; *Alston v. Jones*, 3 Barb. Ch. R. 400.

And if the husband and wife join in a suit as plaintiffs, or in an answer as co-defendants, it will be considered as the suit or the defence of the husband alone; and it will not prejudice a future claim by the wife in respect of her separate interest, nor will the wife be bound by any of the allegations therein in any future litigation. *Pawlet v. Delaval*, 2 Ves. sen. 666; *Mole v. Smith*, 1 Jac. & W. 648; *Hughes v. Evans*, 1 Sim. & Stu. 185; *Reeve v. Dalley*, 2 Ibid, 464; *Wake v. Parker*, 2 Keen, 73; *England v. Downs*, 1 Beavan, 96; *Sigel v. Phelps*, 7 Simons, 239; *Owden v. Campbell*, 8 Simons, 551; 1 Daniell's Ch. Prac. 142.

And in suit by the wife for her separate estate, the husband is a necessary defendant. *S. A. and Thorby v. Yeats*, 1 Younge & Coll. 438.

But the practice, where the husband unites with the wife, is not to dismiss the bill, but to give permission to the wife to amend by adding a next friend and making the husband a defendant. *England v. Downs*, 1 Beavan, 96; *Wake v. Parker*, 2 Keen, 73.

Or, where no objection is interposed, to decree the fund to be paid to a trustee for the use of the wife. *Griffith v. Wood*, 2 Vesey, 452; *Simons v. Horwood*, 1 Keen, 7; *Sigel v. Phelps*, 7 Simons, 239.

In *Bein and Wife v. Heath*, 6 Howard, 228, it was held, by the Supreme Court of the United States, that it was no objection to a bill filed in relation to the separate property of the wife, that the husband is made a party to it with the wife. In delivering the opinion of the court, Mr. Justice McLean said: "Where the wife complains of the husband and asks relief against him, she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This a matter of practice within the discretion of the court. It is sanctioned in the sixty-third section of Story's Equity Pleadings, and by Fonblanque." In some of the earlier editions of Story's Equity Pleadings, the practice, as stated by Mr. Justice McLean, was certainly sanctioned by the language of the section referred to. It is stated to be the ordinary practice, at least for conformity's sake, in suits by or against the wife

in regard to her separate property, to join the husband as a party plaintiff or defendant. But in the more recent editions of the treatise the phraseology of the section is materially changed, with the very design of guarding against misapprehension, and conforming it to the well-settled rule of the English courts of equity. The rule is stated thus: "In practice, where the suit is brought by the wife for her separate property, the husband is sometimes made a co-plaintiff. But this practice is incorrect, and in all such cases she ought to sue as sole plaintiff by her next friend, and the husband should be made a party defendant, for he may contest that it is her separate property, and the claim may be incompatible with his marital rights." Story's Eq. Pl. (6th ed.), sec. 63. \* \* \* 1

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<sup>1</sup> "In general, therefore, where the suit relates to the separate property of the wife, it is necessary that the bill should be filed in her name, by her next friend, otherwise, the defendant may demur, upon the ground that the wife might at any future time institute a new suit for the same matter, and that, upon such new suit being instituted, a decree in a cause over which her husband had the exclusive control and authority, would not operate as a valid bar against her subsequent claim. Where, however, the suit is for a chose in action of the wife, not settled to her separate use, the defendant cannot object to the husband's suing jointly with her as co-plaintiff; nor will her right to a settlement be prejudiced by the fact of her husband being so joined with her in the suit.

Where the wife sues by her next friend, the husband must still be a party, and it is usual to make him a defendant; but a husband having no adverse interest to his wife, may be made a co-plaintiff.

As a wife may sue her husband in respect of her separate property, so may a husband in a similar case sue his wife. Such suit, however, can only be in respect to his wife's separate estate; for a husband cannot have a discovery of his own estate against his wife. In those cases where it is necessary that a suit respecting the property of a married woman should be instituted against her husband, or that the husband should be one of the defendants: as the wife, being under the disability of coverture, cannot sue alone, and she cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name, by her next friend, who is named as such in the bill, as in the case of an infant. A bill, however, cannot, as in the case of an infant, be filed by a next friend on behalf of a married woman, without her consent; and if a suit should be so instituted, upon special motion, supported by her affidavit of the matter, it will be dismissed." — DANIELL'S CHANCERY PRACTICE, 4th Am. Ed., vol. 1, pp. 109-110.

*The Wife's Statutory Separate Estate.*ANKENEY *v.* HANNON.

147 U. S. 118.—1892.

THIS was a suit in equity to charge the separate estate of a married woman with the payment of certain notes of which her husband was one of the makers, such estate having been acquired subsequently to their execution. It arose out of the following facts: On the 25th of March, 1880, Joseph E. Hannon, Clara M. Hannon, and William H. Hannon, executed their three promissory notes, aggregating \$14,969.31, dated at Xenia, Ohio, and payable to the order of Joseph E. Hannon, one of the makers. They were subsequently transferred to the complainants before maturity for a valuable consideration. Clara M. Hannon is the wife of Joseph E. Hannon, and at the time the notes were signed she possessed a small separate estate; and in each of the notes she inserted the following provisions: "Mrs. Clara M. Hannon signs this note with the intention of charging her separate estate both real and personal."

The case thus presented the single question, whether the separate estate of the wife, Mrs. Clara M. Hannon, acquired by her by inheritance from her father, in 1882, was chargeable with the payment of the notes described, executed and delivered by her and others in March, 1880.

MR. JUSTICE FIELD delivered the opinion of the court.

At common law, a married woman is disabled from executing any promissory notes, either alone or in conjunction with her husband. A note or other contract signed by both is the obligation of the husband alone. And in the absence of legislation a separate estate to her can only be created by conveyance, devise, or contract, and remedies against such estate can only be enforced in equity. At the time Mrs. Hannon signed the notes in controversy, married women in Ohio were subject to their common-law disabilities, except with respect to certain statutory contracts, and had power to charge their separate estate only in accordance with the ordinary rules of equity. Subsequently, in 1884, the laws of Ohio were amended, authorizing married women, during coverture, to contract in the same extent and in the same manner as if they were unmarried. (Amendatory sections Rev. Stats., 3108, 3109, 3110 and 3111.) And in March, 1887, it was further provided that "a husband or wife may enter into any engagement or transaction with the other, or with any other person, which

either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other." But at the time the notes in question were signed by Mrs. Hannon the rights and liabilities of married women in Ohio, so far as they differed from the doctrine of the common law, were determined by the following sections of the Revised Statutes which embodied the provisions of the act known as the Keys act, passed April, 1861. These sections are as follows:

"Section 3108. An estate or interest, legal or equitable, in real property belonging to a woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise or inheritance, or by purchase with her separate means or money, shall, together with all the rents and issues thereof, be and remain her separate property, and under her control; and she may, in her own name, during coverture, make contracts for labor and materials for improving, repairing and cultivating the same, and also lease the same for any period not exceeding three years. This section shall not affect the estate by the curtesy of a husband in the real property of his wife after her decease; but during the life of such wife, or any heir of her body, such estate shall not be taken by any process of law for the payment of his debts, or be conveyed or incumbered by him, unless she joins therein with him in the manner prescribed by law in regard to their own estate.

"Section 3109. The personal property, including rights in action, belonging to a woman at her marriage, or coming to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or due as the wages of her separate labor, or growing out of any violation of her personal rights, shall, together with all income, increase and profit thereof, be and remain her separate property and under her sole control; and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of the husband to personal property reduced to his possession with the express assent of his wife; but personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless, by the terms of said assent, full authority is given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit.

"Section 3110. The separate property of the wife shall be liable to be taken for any judgment rendered in an action against husband and wife upon a cause existing against her at their marriage, or for



a tort committed by her during coverture, or upon a contract made by her concerning her separate property, as provided in section 3108.

"Section 3111. A married woman, whose husband deserts her, or from intemperance or other cause becomes incapacitated, or neglects to provide for his family, may, in her own name, make contracts for her own labor, and the labor of her minor children, and in her own name sue for and collect her or their own earnings; and she may file a petition against her husband, in the Court of Common Pleas of the county in which she resides, alleging such desertion, incapacity or neglect, and upon proof thereof the court may enter a judgment vesting her with the rights, privileges and liabilities of a *feme sole*, as to acquiring, possessing and disposing of property, real and personal, making contracts, and being liable thereon, and suing and being sued in her own name; but after such judgment the husband shall not be liable upon any contracts so made by her in her own name, or for any tort thereafter committed by her."

Sections 4996 and 5319 should also be quoted, as they are supposed by the appellants to have some bearing upon the questions presented.

Section 4996 is as follows:

"A married woman cannot prosecute or defend by her next friend, but her husband must be joined with her, unless the action concerns her separate property, is upon her written obligation, concerns business in which she is a partner, is brought to set aside a deed or will, or to collect a legacy, or is between her and her husband."

Section 5319 is as follows:

"When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced as if she were unmarried, and her separate property and estate shall be liable for the judgment against her, but she shall be entitled to the benefit of all exemptions to heads of families."

These last two sections originally were parts of an act passed in 1874. It has been held by the Supreme Court of Ohio that the legislation contained in these provisions, considered either by itself or in connection with the act of March 30, 1874, the provisions of which are embraced in sections 4996 and 5319 of the Revised Statutes, does not enlarge the capacity of married women to make contracts except in the instances specifically mentioned. The case of *Levi v. Earl*, 30 Ohio St. 147, maintains this position, after an elaborate analysis and consideration of the legislation on the powers and disabilities of married women in the state. That case was decided, it is true, by the Supreme Court Commission of Ohio and not by

the Supreme Court of the state, but that commission was appointed by the governor of the state, under an amendment of the Constitution adopted to dispose of such part of the business on the docket of the Supreme Court as should, by arrangement between the commission and the court, be transferred to the commission. The amendment declares that the commission shall have like jurisdiction and power in respect to such business as may be vested in the court. A decision of the commission upon a question properly presented to it in a judicial proceeding is, therefore, entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative.

The case cited, among other things, adjudges and declares (1) that by the provisions of law quoted the wife is authorized to make contracts in her own name for labor and materials for improving, repairing and cultivating her separate estate as defined by them, and for leasing the same for a term not exceeding three years, and that upon such contracts the wife is liable to an action at law and to a judgment and execution as a *feme sole*, but that all her other engagements, debts or obligations are void at common law, the same as before the adoption of the provisions mentioned; (2) that by those provisions the marital rights of the husband were divested as to the wife's general estate, and the wife was invested with the control of the same, and could bind it not only by the contracts which she was authorized to make in her own name, but to the same extent as she could charge her separate estate in equity before the provisions were adopted; (3) that the power of a court of equity to charge the separate estate of a married woman as existing and exercised before those provisions were adopted still existed not only as to such separate property, but also as to her separate property as defined by those provisions, except as to such contracts as she was authorized to make in her own name, upon which a remedy at law was given by the statute.

It has always been held by the Supreme Court of Ohio that sections 4996 and 5319 of the Revised Statutes, which embody the provisions of the act of March 30, 1874, were intended simply as an amendment to the Code of Civil Procedure, and did not affect or enlarge the rights or liabilities of married women, but related merely to the remedy. *Fenz v. Gugel*, 26 Ohio St. 527; *Allison v. Porter*, 29 Ohio St. 136; *Avery v. Vansickle*, 35 Ohio St. 270.

The powers and liabilities of married women not being affected in any particulars except those mentioned, by the legislation of Ohio previous to the execution of the notes in controversy, the defendant, Mrs. Hannon, did not charge her subsequently acquired estate at

law for their payment, when she signed them in connection with her husband. Even if under the legislation in question she would, by the decision in *Williams v. Urnston*, 35 Ohio St. 296, which is said to qualify, in some respects, the decision in *Levi v. Earl*, have charged at law her separate estate existing at the time of the execution of the notes in the absence of the express statement in them that she intended thus to charge it, there is nothing in the legislative provisions adopted which enlarges her power at law to charge any future acquired estate. The question then remains to be considered whether her after acquired estate is chargeable in equity. That is to be determined by the ordinary rules of equity, and we think it is clear that the contracts of married women are not chargeable in equity upon their subsequently acquired estates.

The separate estate of a married woman, as we have stated, is, in the absence of legislation on the subject, created by conveyance, devise or contract. Its creation gives to her the beneficial use of the property which otherwise would not be brought under her control. As to such property she is regarded in equity as a *feme sole*, and it was, therefore, formerly held that her general engagements, though not personally binding upon her, could be enforced against the property. This doctrine, however, has been modified in modern times. It is now held that to charge her separate estate with her engagement, it must have been made with an intention on her part to create a charge upon such estate; that is, with reference to the property, either for its improvement or for her benefit upon its credit. There has been much divergency of opinion and some conflict both in the courts of England and of this country as to what is necessary to establish such intention on the part of the wife to charge her separate estate for her contract. It is conceded that there must have been an intention on her part to affect such a charge, otherwise her engagement will not have that effect.

The numerous decisions in the High Court of Chancery of England have shown this divergency and conflict in a marked degree. Lord Thurlow placed the right of the wife to charge the property upon her right as owner to dispose of it without other authority. *Hulme v. Tenant*, 1 Bro. C. C. 16; *Fettiplace v. Gorges*, 3 Bro. C. C. 8. But this theory was afterwards rejected by Lord Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her separate property. *Bolton v. Williams*, 2 Ves. jun. 138.

This doctrine proceeded upon the assumption that the wife's

separate estate was not liable for her general engagements, but only for such as were specifically charged in writing upon it. This theory Lord Brougham rejected, holding that there was no valid distinction between a written security, which the married woman was incapable of executing, and a promise by parol, and that mere parol engagement of the wife was equally effective to create a charge as her bond or note. *Murray v. Barlee*, 3 Myln & K. 209.

The reasoning of Lord Brougham to establish his views was afterwards met and rejected by Lord Cottenham. *Owens v. Dickenson*, 1 Craig & Ph. 48.

The Court of Appeals of New York, in the case of *Yale v. Dederer*, 22 N. Y. 450, considered very fully the evidence which would be required to charge the separate estate of the wife upon her contract, and in its examination reviewed the various decisions of the English Court of Chancery, pointing out their many differences and conflicts, and placed its decision upon this ground, that such estate could not be charged by contract unless the intention to charge it was stated in the contract itself or the consideration was one going to the direct benefit of the estate. In that case a married woman signed a promissory note as a surety for her husband, and it was held, though it was her intention to charge such estate, that such intention did not take effect, as it was not expressed in the contract itself.

In the case of *Willard v. Eastham*, 15 Gray, 328, 335, the same question was elaborately considered by the Supreme Judicial Court of Massachusetts. In that case a debt was contracted by a married woman for the accommodation of another person without consideration received by her, and it was held that the contract could not be enforced in equity against her separate estate, unless made a charge upon it by an express instrument. And the court concludes, after a full consideration of the subject, by observing that the whole doctrine of the liability of a married woman's separate estate to discharge her general engagements rests upon grounds which are artificial and which depend upon implications too subtle and refined; and that "the true limitations upon the authority of a court of equity in relation to the subject are stated in great clearness and precision in the elaborate and well reasoned opinions of the Court of Appeals of New York in the case of *Yale v. Dederer*," which we have cited, and says: "Our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But



where she is a mere surety or makes the contracts for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

We concur in these views as to the limitation on the authority of a court of equity in relation to the subject. In this case the amended bill avers that the defendant, Mrs. Hannon, executed the notes in question with the intention of charging her after-acquired property; but inasmuch as her contract is in writing, the averment can be regarded only as the pleader's conclusion, which must be determined by the application of the law to the undertaking itself. There is nothing in the written agreement which makes any reference to an after-acquired estate.

In *Pike v. Fitzgibbon*, 17 Ch. D. 454, 460, the question as to the power of a married woman to bind her subsequently acquired estate was considered. In that case Lord Justice James said: "Another point also has been raised, of which we must dispose, and which has arisen, as it seems to me, from a misapprehension of some of the cases. It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable status of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge that estate and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a court of equity to contract debts to be paid and satisfied out of any estate settled to her separate use which she may afterwards acquire, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. In my opinion there is no authority for that contention, which appears to rise entirely from a misapprehension of the case of *Pickard v. Hine*, L. R. 5 Ch. 274, and one or two other cases which follow it, in which this point was never suggested.

\* \* \* I desire to have it distinctly understood as my opinion and the opinion of my colleagues, and, therefore, as the decision of this court, that in any future case the proper inquiry to be inserted is what was the separate estate which the married woman at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the court. That is all that the

court can apply in payment of the debt." Lord Justice Brett, in his concurring opinion, said: "The decisions appear to me to come to this, that certain promises (I use the word 'promises' in order to show that in my opinion they are not contracts) made by married women, and acted upon by the persons to whom they are made, on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remained at the time of judgment recovered, whether such judgment be recovered during or after the cessation of the coverture. That proposition so stated does not apply to separate estate coming into existence after the promise which it is sought to enforce." p. 462.

It is true that in that case (*Pike v. Fitzgibbon*), as stated by Lord Justice James, it did not appear that the appellant had, since the date of her engagement, acquired any property settled to her separate use, and had not asked by the appeal to vary the judgment as regards subsequently acquired property. "It is therefore sufficient," said the lord justice, "to state, as a warning in any future case, that the only separate property which can be reached is the separate property or the residue of the separate property, that a married woman had at the time of contracting the engagements which it is sought to enforce." But in *King v. Lucas*, 23 Ch. D. 712, 724, in the Court of Appeal, the question whether the engagements of a married woman could be charged upon her subsequently acquired estate, was actually involved, and the decision in *Pike v. Fitzgibbon* was held conclusive. Said Cotton, L. J.: "With respect to her separate estate she is treated as a *feme sole*, but it has been decided that it must be separate estate which belonged to her at the time of the making of the contract, and is still remaining at the time when the contract is enforced and judgment obtained. In *Pike v. Fitzgibbon* it was held by a learned judge that all separate property could be charged which belonged to the married woman at the time when the contract was enforced, but that was held to be erroneous by the Court of Appeal, and the rule was laid down that the contract could be enforced only against the separate estate existing at the time of the contract. In the present case, therefore, there is no question as to any principle; the only question is whether certain property was the separate property of the lady when she made the contract."

In view of the considerations stated and the decisions mentioned, and numerous others which might be cited, we are of opinion that in Ohio the separate property of a married woman could not be charged in equity by contracts executed previous to its existence, for the obvious reason that in reference to such property the con-

tracts could not be made. The after-acquired estate was not at the time available in a court of equity to meet the contracts, for at that date it had no existence. The English Married Woman's Property act of 1882 provided that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." And in section 1 (sub. sec. 4), it was declared that "every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of contract, but also all separate property which she may thereafter acquire." And yet in *Deakin v. Lakin*, 30 Ch. D. 169, 171, it was held that this act did not enable a married woman, who had no existing separate property, to bind by a contract separate property afterwards acquired, and Pearson, J., said: "In my opinion, according to the true construction of the act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it. If she afterwards commits a breach of the contract, and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract and which she has at the time when judgment is recovered against her, will be liable for the breach of the contract. But the act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property."

It follows that the decree must be affirmed, and it is so ordered.

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### *The Wife's Equity to a Settlement.*

#### POINDEXTER *v.* JEFFRIES.

15 GRATT. (VA.) 363.—1859.

IN 1851, John Bowyer died intestate leaving real and personal estate. One of his children was Frances, the wife of G. B. Poindexter. In December, 1851, G. B. Poindexter conveyed his interest in his wife's undivided portion of her father's *real* estate to F. B. Lewis. In September, 1852, in a suit brought by the administrator for partition of the real and personal estate, a decree for partition was made. Before this decree was executed, to wit, on October, 20, 1852, Poindexter conveyed his interest in his wife's portion of the *personal* estate to W. B. Poindexter and F. B. Lewis for the sole use

of herself and children. Shortly afterwards, the estate was partitioned and the portion assigned to G. B. Poindexter and wife was 145½ acres of land and two slaves. April 16, 1853, Mrs. Poindexter filed a petition asking that the personal property apportioned to her be assigned to W. B. Poindexter and F. B. Lewis, trustees in the deed of October 20, 1852, in trust for the purposes expressed therein; and that such additional provision might be made for her out of the life estate of her husband in the real estate descended to her from her father, as the court might deem adequate. On the same day the report of the partition was confirmed, but subject to her rights to such future decree as the court might make upon her petition.

On June 21, 1851, F. B. Lewis had obtained a decree against G. B. Poindexter and his sureties, Jeffries and Pollard, for \$2,975.16; and the sureties, having satisfied the decree, had it registered for their benefit March 30, 1852, and levied upon one of the slaves which had been allotted to Poindexter and wife. The sale was suspended by injunction issued November 11, 1853, upon the petition of Poindexter and wife.

In this state of things the bill in this case was filed in January, 1854, by Jeffries and Pollard against F. B. Lewis, in his own right, F. B. Lewis and W. B. Poindexter, as trustees in the deed of October 20, 1852, and G. B. Poindexter and wife, stating the facts and praying that the said deed might be vacated; the injunction dissolved; the two slaves subjected to the execution of the plaintiffs; and the life interest of G. B. Poindexter in the land assigned to his wife, and his interest in the dower slaves, subjected to the claim of the plaintiffs. After trial of this cause, a decree was obtained, from which Poindexter and wife applied for, and obtained, an appeal.

MONCURE, J. This case involves the doctrine of what is familiarly called "the wife's equity;" the origin and foundation of which are involved in much doubt, but which has been long and firmly established in England; 2 Story's Eq. secs. 1402, 1407, etc.; and though but recently recognized in this state, is now well established here also. *Gregory's Adm'r v. Mark's Adm'r*, 1 Rand. 355; *Gallego v. Gallego's Ex'or*, 2 Brock. R. 285; *Browning v. Headley*, 2 Rob. R. 340; *Dold's Trustee v. Geiger's Adm'r*, 2 Gratt. 98; *James, etc. v. Gibbs*, 1 Pat. & Heath, 277. I will not attempt to investigate it fully, but will state only so much of it as seems to be pertinent to the present case. The authorities on the subject are collected and commented on in 1 Lead. Cas. in Eq., Am. ed., 1859, top paging, 453-501.

The doctrine may be briefly stated thus: That a wife is entitled to



an equitable settlement out of her property, not only against her husband, but against all creditors of, and purchasers from him, whenever it is recoverable only in a court of equity, or the aid of that court is actually invoked for its recovery; unless the husband has become a purchaser of the property by an ante-nuptial contract with the wife. If it be recoverable at law, and the aid of a court of equity be not actually invoked to recover it, her equity does not exist. And it ceases to exist, though the property be recoverable in equity, whenever it has been actually recovered or received without any claim by her to a settlement. Whenever the husband, in right of his wife, has obtained possession of, and title to her property, his own title, *jure mariti*, becomes complete; and the property, to the extent of his title, is subject to his right of disposition, and to the claims of creditors and purchasers, like any other property of his any otherwise acquired. 2 Story's Eq. sec. 1403. If he or they have occasion to go into a court of equity for its assistance in regard to property to which his title has thus become complete, that court, cannot, as the price of its assistance, impose upon him or them the terms of a settlement out of it on the wife. The relief sought in such a case, being due *ex debito justitiæ*, must be decreed unconditionally. It may be laid down as a universal rule, that when property, by being reduced into the husband's possession, has once been released from the wife's equity, it can never again be subjected to it. I mean, of course, the wife's equity, technically so called; which overrides the claims of the husband and all persons claiming under or against him. 1 Lead. Cas. in Eq. 468, 498. Property acquired by the husband *jure mariti*, like any other property of his, may become liable to the equitable claims of the wife in a suit for a divorce *a mensa et thoro*, and perhaps in a suit for alimony. *Id.* 496-7. But such liability is subordinate to prior liens acquired under or against the husband.

It seems to have been at one time considered that real estate was not subject to the wife's equity; and, at all events, that it was not so subject if it were not a trust estate, but one in its nature legal, which becomes from collateral circumstances the subject of a suit in equity; as where the legal estate happens to be outstanding in a mortgagee. But both of these points were decided affirmatively in the case of *Sturgis v. Champneys*, 5 Milne & Cr. 97; reported also in 9 Law J. N. S. p. 100. In that case the wife of an insolvent was entitled for her life to real estate which had been devised to her without the intervention of trustees; but the legal title was outstanding in certain mortgagees, and the assignee of the insolvent was obliged to file a bill to make his title (subject to the incumbrances)

effectual. It was held by Lord Chancellor Cottenham (reversing the decision of the vice-chancellor), that the wife was entitled to a settlement out of the rents and profits of the estate during the coverture. In *Hanson v. Keating*, 4 Hare, 1, 30 Eng. Ch. R. 1, Vice-Chancellor Wigram, who had been counsel for the assignee of the husband in *Sturgis v. Champneys*, remarked, that prior to that case the opinion of the profession had, he believed, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land. But, in deference to that judgment, he followed it, "although (he further remarked) if that case were out of the way, I should probably have decided otherwise. There would be no difficulty (he said), in distinguishing the facts of this case from those in *Sturgis v. Champneys*; but the reasoning in that case would remain, and I cannot disregard it." That case has also been followed by other cases, and its authority seems to be now fully established in England. *Freeman v. Fairlie*, 11 Jur. 447; *Newenham v. Pemberton*, 17 Law J. Equity N. S. P. 99; s. c., 1 D. G. & Sm. 644. I have seen no American case in conflict with it. In *Dold's Trustee v. Geiger's Adm'r*, 2 Gratt. 98, no question was raised as to the liability of real estate to the wife's equity; but it was held not to be liable in that case, because the husband had the legal title and possession. See, also, *Van Duzer v. Van Duzer*, 6 Paige's R. 366; and *Wickes v. Clarke*, 8 Id. 161. In *James, etc. v. Gibbs, etc.*, 1 Pat. & Heath, 277, the Special Court of Appeals referred to and recognized the case of *Sturgis v. Champneys*, and decreed a settlement on the wife out of her real estate. It is unnecessary, however, in my view of this case, to decide the question, and I therefore express no opinion upon it, but will assume, for the purposes of the case, that the doctrine is alike applicable to real and personal estate.

As to the amount of the wife's property to be settled; the general rule at one time was to settle upon her one-half of the subject. 1 Roper on Husband and Wife, 260; 1 Leading Cas. in Eq., edition of 1859, p. 483. But this is a matter in the discretion of the court, which will take into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been made. Id. Accordingly, in *Coster v. Coster*, 9 Sim. R. 597, three-fourths of the fund was settled on the wife by Sir L. Shadwell, V. C.; and in *Napier v. Napier*, 1 Drew. & Walk. 407, six hundred pounds out of a fund amounting to one thousand pounds, were settled on her by Ld. Ch. Sugden. It has been said that the court will not, except perhaps under very peculiar circumstances, settle the whole of the property on the wife. And in *Beresford v. Hobson*,

1 Madd. R. 362, in which the master, upon a reference, had approved of the settlement of the whole, Sir Thomas Plumer, V. C., sustained the exception taken to the report; observing, after an elaborate review of the authorities, that the question in most cases had been, how much the wife should have; and in determining that, the court had exercised a discretion, and had not tied itself down to any precise rule, but had never given the whole. But the whole has been given in many subsequent English cases, which are cited in 1 Lead. Cas. in Eq. 485. The American cases seem to be to the same effect, many of which are cited in the notes of Hare & Wallace to that valuable work, p. 499. This court, in *Browning v. Headley*, 2 Rob. R. 340, gave the whole to the wife. The true rule on the subject seems, therefore, to be, that the settlement should be reasonable and adequate, and may be of part or the whole of the property, according to the sound discretion of the court upon all the circumstances of the case. The usual practice is to refer it to a commissioner to inquire and report what would be a reasonable and adequate settlement. But the court may decide this question for itself, if there be sufficient material in the record for the purpose: and if it plainly appear that the whole property subject to the settlement is not more than adequate, a reference is, of course, unnecessary.

As to when the provision for the wife should take effect, this, also, is a matter of discretion with the court upon all the circumstances. If her husband lives with and supports her, it may be made to take effect when he ceases to do so, or at his death. But if he has deserted or ill-treated her, or is insolvent, or is unable or fails to support her, it will be directed to commence immediately. 1 Lead. Cas. in Eq. 499.

The wife's equity is so substantial an interest that it will constitute a valuable consideration for a post-nuptial settlement by the husband upon her (made while the equity exists), which will be sustained against his creditors, to the extent of the equity, by a court of chancery. *Id.* 500. "The same circumstances which would induce the court (said the V. C. in *Wickes v. Clarke*, 8 Paige's R. 166) to compel a settlement by the husband, or those claiming under him or in his right, will operate to uphold a deed of settlement already made, to the same extent that would be required if one should be directed to be made under the view of the court."

The equity of the wife will be administered to her, not only in a suit in which the husband or his assignee is plaintiff, seeking the aid of a court of equity to recover her property; but generally, also, in a suit brought by her or her trustee for the purpose of asserting it. This was at one time doubted, it being supposed that the juris-

diction rested solely on the ground that he who asks equity should do equity; but it has long since been firmly established. 2 Story's Eq. sec. 1414; 1 Roper on Husb. and Wife, 260; *Elibank v. Montolieu*, 5 Ves. R. 737; *Nettenham v. Pemberton*, 17 Law J. Equity N. S. 99; 1 Lead. Cas. in Eq. 468.

There seems to be one exception to this general rule, and that is, where the property is in its nature legal, but the aid of a court of equity is invoked for its recovery on some collateral ground of jurisdiction; as in the case of a mortgage debt recovered in a foreclosure suit. There, the wife's equity attaches solely on the ground that he who asks equity must do equity, and therefore cannot be asserted in a suit brought by her. 1 Roper on Husb. and Wife, 258, 260.

The argument of the counsel for the appellees, that the doctrine of the wife's equity, recognized and acted on by this court, is that which had been settled in England at the time of the establishment of our chancery court, and that we must therefore look only to the English decisions prior to that time to ascertain the law upon the subject, is, I think untenable. The subsequent English decisions are, of course, not binding upon us; but they are entitled to great respect, and at least as much on this question as on any other.

Having stated so much of the doctrine as seems to be pertinent, I will now endeavor to apply the law to the facts of this case.

There can be no question but that the doctrine applies to Mrs. Poin-dexter's portion of her father's personal estate. That estate at his death devolved on his personal representative. His distributees at law, of whom she was one, could recover it only in equity. She asserted her claim to an equitable settlement out of her distributive portion before it was received or recovered by her husband, and before the report of partition of the estate was confirmed by the court. And though the report was confirmed and her portion received before the decree sustaining the settlement which had been made upon her by her husband, yet the confirmation was expressly subject to the future order or decree of the court upon her petition for a settlement which she had previously filed. The deed of settlement of the 20th of October, 1852, was certainly executed before her husband received possession of her portion or any part of it; and that settlement, having afterwards been sustained by the decree of the court, is valid (if properly sustained), notwithstanding possession of the property was received between the dates of the deed and of the decree. The argument of the appellee's counsel, that the administrator of Bowyer, being also one of his distributees, by bringing the suit for partition, elected henceforward to hold the subject as distributee, and not as administrator; that the possession of one



parcener is the possession of all; and that therefore Poindexter was in possession of his wife's portion of the personal estate before she claimed her equity, cannot be sustained. The administrator did not cease, as such, to hold the personal estate of his intestate, so far as the record shows, until it was actually distributed; until which time it was assets in his hands, and he was not bound to distribute it without refunding bonds.

Nor can there be any doubt as to the propriety of the decree approving and confirming the said deed. The settlement thereby made was certainly not excessive, in view of all the circumstances of the case. And the husband being insolvent and unable to support his family, it was properly provided in the deed that the property should immediately enure to the benefit and maintenance of the wife and children. The deed may not be in such form as the court would have prescribed; but the wife being satisfied with it, and having petitioned for its confirmation, the court properly confirmed it, as it did not prejudice the rights of the husband's creditors.

Then as to the real estate: Was the wife entitled to an equitable settlement out of her husband's interest in that estate (assuming the doctrine to be applicable to real estate)? She derived it by descent from her father, who at the time of his death was possessed thereof and had a legal title thereto. Her husband had no occasion to go into equity to obtain possession or complete his title. If any remedy had been necessary by reason of the act of a wrong-doer in taking or withholding possession, it would have been a legal remedy. But none was necessary. There was no interruption, either of the title or possession, both of which devolved at once upon the heirs-at-law of her father as coparceners. The possession of one was the possession of all the coparceners. 1 Lom. Dig. 489, marg. And the seizin of one was sufficient to entitle the husband of another to be tenant by the curtesy. Id. 69, marg. sec. 14; 1 Bright on Husb. and Wife, p. 117, ch. 10, sec. 1, Nos. 6 and 7. But here all were actually seized, so far as the record shows. Momentary seizin is sufficient to complete the husband's title. Id. No. 9. But in this case there has been no interruption of his seizen. A husband by becoming possessed of his wife's freehold estate of inheritance during the coverture, acquires a freehold interest during their joint lives, if there be no issue of the marriage, and during his own life, if there be such issue. In the former case, he and his wife are seized in her right, and in the latter he is seized in his own right as tenant by the curtesy initiate, and may maintain an action in respect to his freehold interest in his own name only. Id. p. 112, ch. 9, Nos. 1, 6, 8 and 9. In both cases his interest is unconditional and unencum-

[DOMESTIC RELATIONS — 13.]

bered, and is subject to his right of disposition and liable to his debts. In this case, there being issue of the marriage, the husband became tenant by the curtesy initiate of his wife's interest in her father's real estate, and his freehold estate thus acquired is not liable to his wife's equity. That such an estate is not so liable necessarily results from principles before stated, and has been expressly decided, not only in New York; *Van Duzer v. Van Duzer*, 6 Paige's R. 366; *Wickes v. Clarke*, 8 Id. 161; but also by this court; *Dold's Trustee v. Geiger's Adm'r*, 2 Gratt. 98. In the last-mentioned case Dold and wife brought a suit to recover her share of her father's real and personal estate on the ground that he had died intestate. After a protracted litigation the intestacy was established and the plaintiffs succeeded. Pending the litigation the wife, by her next friend, filed a petition, praying that her share of the estate might be settled on her; and the husband by his answer assented. The Circuit Court decreed accordingly; but with a proviso that the rights of the husband's creditors which may have attached upon the property before the execution of the settlement, should not be affected. The decree further confirmed a division of the real estate that had been previously made, and directed the wife's share to be delivered to the trustee, to be held for her separate use. The suit for the account and the distribution of the personal and profits of the real estate, thereafter proceeded. The result of the suit showed that the share of the wife, exclusive of her share of the slaves, amounted to about \$4,500, much the larger part of which arose from the rents and profits of the real estate, hire of negroes and interest on personalty accruing during the pendency of the suit; and that her share of the slaves was in value about \$2,700. This subject was by the decree of the Circuit Court charged with a debt of the husband due by judgment, amounting in the aggregate, at the date of the decree, to about \$1,500. The trustee of the wife appealed from the decree, which was affirmed by this court. Judge Stanard thus concluded his able opinion in the case, in which the other judges concurred: "In respect to the rents and profits of the real estate, he (the husband) was at law and in equity absolutely entitled to them. Of that real estate there had been actual possession, by virtue of such actual possession by one or more coparceners, and they were accountable at law to the husband for the rents and profits, and he might sue therefor without joining his wife. This subject ought to have been charged, though the principle of the distributable share of the personal estate should be protected in the hands of the wife and her trustee by the relinquishment of the husband. To the tenancy by the curtesy of the husband in the real

estate he had legal title; and that was clearly chargeable with his debts, irrespective of his voluntary surrender thereof to the wife."

The husband's title as tenant by the curtesy having thus become complete, and not being liable to the wife's equity while the estate was held in coparcenary, no state of things which could afterwards arise could subject his interest to that equity. It then stood upon the same footing with his other property, and became alike subject to his right of disposition and the claims of his creditors. Therefore, he or his assigns or judgment-creditors had a right to go into equity to have a partition of the real estate, and an allotment of his wife's portion thereof; and his judgment-creditors had a right to the aid of that court in enforcing the lien of their judgments by a sale of his interest, without being subjected to the condition of a settlement on his wife or any other condition whatever. A parcener acquires no new right, nor is his old right enlarged by a partition. He is entitled to a partition as a legal incident to his estate in coparcenary; and it is merely a different mode of enjoying the estate, to which he may resort at his election. While the estate is held in coparcenary, his seizin is of an undivided interest, and pervades the whole estate. After the division and allotment, his seizin is confined to his several share, but as to that is exclusive. And so too a judgment-creditor of the husband coming into equity to enforce the lien of his judgment by a sale of an interest acquired by the husband in the wife's real estate, is seeking no new right nor to enlarge an old one, but is merely pursuing a remedy expressly given him by law to effectuate a legal lien upon his debtor's property. The wife having no inherent equity in such a case, can acquire none from the fact that she is a defendant to the suit. The maxim that he who asks equity must do equity does not apply to the case. *Hanson v. Keating*, 30 Eng. Ch. R. 1.

The wife's equity attaches, as we have seen, only when resort must be, or is actually, had to a court of equity to reduce her property into her husband's possession, or complete his title thereto, and not when resort may be had to that court for any purpose after such possession has been obtained and title completed. The Special Court of Appeals decided otherwise in *James, etc. v. Gibbs, etc.*, 1 Pat. & Heath, 277; but, with the highest respect for the opinions of that court, I must say that I think the decision contrary to settled principles of law, if not to the decision of this court in *Dold's Trustee v. Geiger's Adm'r, supra*. And I am confirmed in this view by the fact that one of the learned judges who concurred in the decision of the Special Court, afterwards decided this case otherwise in the court below, and must therefore have changed his opinion.

But it is argued by the counsel for the appellants, that as advancements had been made by the intestate to his children in his lifetime, a resort to a court of equity was indispensable to settle an account of the advancements, and ascertain the share to which each of the children was entitled in the partition of the estate; and that therefore the wife's equity attached to Mrs. Poindexter's share as well of the real as of the personal estate. I do not think this conclusion correct. Notwithstanding the fact that advancements happened to have been made to the children, the heirs had a legal title to, and were in possession of the inheritance to the extent of their respective interests, from the death of the ancestor. The title and possession of each parcener as to his undivided share was then complete. The occasion which afterwards arose to go into a court of equity for a partition of the estate and an allotment of the several portions, cannot affect or impair the right of any person concerned. The account of advancements is a mere incident of the partition, affecting, of course, the extent and amount of the several portions, but not the title of the parceners. The distinction is between going into equity to complete the husband's title, and going there for some purpose in regard to the property after the title is completed. In the former case, the wife's equity attaches; in the latter, it does not. Going into a court of equity for an account of advancements and partition of real estate descended and in possession of the heirs, is a case of the former kind. And so is going there to enforce a judgment lien upon a husband's interest in his wife's portion of the estate.

It is further argued, that it does not appear of what the advancements consisted, whether of real or personal estate; and that Poindexter and wife may have been entitled to more personal, and less real estate than they received in the division. See Code, p. 525, ch. 123, sec. 15. The answer to this argument is, that the partition was fairly made, was not excepted to, and has been confirmed by the court. It must therefore now be considered that they received their due and relative portion of the real and personal estate.

I think there is no error in the decree of the Circuit Court, and am for affirming it.

The other judges concurred in the opinion of MONCURE, J.  
Decree affirmed.



*The Wife as Trustee.*

## STILL ET UX. v. RUBY, ET AL.

35 PA. ST. 373. — 1860.

THIS was a *scire facias* by Mary Ruby and John Ruckstool and Eliza A. Ruckstool, which Mary Ruby and Eliza A. Ruckstool were trustees of The Heart and Hand Female Beneficial Society of Philadelphia, against Charles Still and Sarah K. his wife, on a mortgage given by the defendants to the female plaintiffs, as trustees, on the 19th day of February, 1856, to secure the payment of \$500 and interest in one year from the date thereof.

The following affidavit of defense was filed by Charles Still, one of the defendants:

"Charles Still, one of the above named defendants, and on behalf of his co-defendant, being duly sworn, etc., saith: That they have a just and legal defence to the whole of plaintiffs' claim in the above case, the nature and character of which is as follows: That the said Eliza A. Ruckstool, one of the above named plaintiffs, before and at the time of the commencement of this suit, and at the time of the execution of the mortgage on which said suit is brought, was and still is married to one John Ruckstool, then and yet her husband, who is still living, to-wit, at Philadelphia aforesaid, in the county aforesaid; and this deponent for himself and his co-defendant further says, that they have not, nor has either of them any knowledge of John Ruckstool joined as a party plaintiff in this suit, except as the reputed husband of the said Eliza A. Ruckstool — his name does not appear in the mortgage on which this suit is brought — nor have this deponent and his co-defendant, nor has either of them at any time had any transactions of business or otherwise with him. All of which the deponent expects to be able to prove on the trial of the case."

The court below, on motion of the plaintiffs' counsel, gave judgment for want of a sufficient affidavit of defence, which was here assigned for error.

WOODWARD, J. The affidavit disclosed no defence whatever. Mrs. Ruckstool, as appeared on the face of the mortgage, was only trustee for The Heart and Hand Female Beneficial Society, in whom the beneficial interest of the mortgage was vested. *Femes covert*, like infants, lunatics, and others *non sui juris*, may be trustees, subject, of course, to their legal incapacity to deal with the estate vested

in them: *Hill on Trustees*, 49. The incapacity of Mrs. Ruckstool to sue in her own name was obviated by her husband joining with her. The mortgagors must pay the money as they agreed to do.

The judgment is affirmed.<sup>1</sup>

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<sup>1</sup> Dower in trust property does not exist independent of statute. In most jurisdictions the statute is now broad enough to create a dower interest in an equitable estate. 1 *Ames' Cases on Trusts* (2d Ed.), p. 375. See *In the Matter of the Estate of Henry P. Pulling*, 97 Mich. 375; reported herein, *supra*. Yet a husband has an estate by the curtesy in his wife's equitable property. *Ames Cases on Trusts* (2d Ed.), pp. 379-380.

*The Wife's Domicile.*

SUTER v. SUTER.

72 Miss. 345.—1894.

WOODS, J. This is an appeal from a decree of the court below allowing alimony and counsel fees *pendente lite*, in proceedings instituted by a wife for divorce from her husband for desertion.

From the bill filed by the wife, and from her evidence offered in support of her application for alimony and counsel fees, it is perfectly certain that the home of the husband is in New Orleans, La.; and the domicile of the husband is that of the wife. From the same sources of information, it is clear that, shortly after the return of the husband from Biloxi to his business and home in New Orleans, he invited the wife to join him in their home in that city; that she was urged by Mr. Clarke to return to her husband and home, and declined to do so except upon condition of her husband's placing the title to the home in their joint names, in order to prevent any sale of the same by the husband without her consent; and that, in September, 1890, the husband wrote the wife, stating his inability to bear the double expense of their living separate, and calling her attention to her former refusal to go to New Orleans, where he was compelled to remain to make a living, and urging the wife to come to him with their children.

In his sworn answer, the husband states his efforts to have the wife return to him and his home, and avers his willingness to receive her now.

It is a mistake on the part of the wife when she declares that her homestead is in Biloxi. Her domicile is that of her husband, and his is in New Orleans, and she cannot, to suit her convenience or pleasure, create a home distinct from her husband's by refusing to reside in the domicile of his choice.

There is nothing in the case, as made by the wife, which constitutes this an exception in the general rule just announced. We have been unable to see any reasonable ground, suggested even by the wife's own showing, why she should not return to her husband's home and hers.

That the husband has sold the residence property in New Orleans since her refusal to return to New Orleans is of no concern what-

ever. The ownership of a residence property is not a prerequisite to the selection of a domicile and the establishment of a home.

On the wife's showing, her bill and her application for alimony and counsel fees are a fraud upon the jurisdiction of the court.<sup>1</sup>

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### REDFIELD, CH. J., IN *POWELL v. POWELL*.

29 VT. 148, 150.—1856.

Now, while we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as continued from mere wilfulness.

Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed. This would be very far from compliance with the Scriptural exposition of the duty of husbands: "For this cause shall a man leave father and mother and cleave to his wife, and they twain shall be one flesh."

And in the present case, as the wife alleges the vicinity of the husband's relatives as a reason why she cannot consent to come to Milton to live with him, and as every one at all experienced in such matters knows that it is not uncommon for the female relatives of the husband to create, either intentionally or accidentally, dis-

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<sup>1</sup> "The theory of the law, that husband and wife are one person, and, wherever the wife may be actually, she is constructively with her husband, is not applicable to a wife who remains in a place where she and her husband last lived together, after he is gone, and brings a suit against him for a divorce founded on his misconduct while they were together. She may retain her old domicile, acquired when she and her husband were actually abiding in the same place, and is not compelled to follow him to a place where she never lived, merely because before she discovered his offence she intended to go there with him; but this exception to the general law of domicile has no application in suits brought by the husband against the wife for her misconduct."—Syllabus in *Burtis v. Burtis*, 161 Mass. 508.



quietude in the mind of the wife, and thereby to destroy her comfort and health often, and as there is no attempt here to show that this is a simulated excuse, we must treat it as made in good faith, and if so, we are not prepared to say that she is liable to be divorced for acting upon it.

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*Chastisement or Restraint of the Wife.*

THE PEOPLE *v.* WILLIAM WINTERS.

2 PARK. CR. REP. (N. Y.) 10.—1823.

THE prisoner was indicted for assault and battery on his wife. It appeared on the trial that the prisoner attempted to correct one of his children, and that his wife interfered and made such a noise as to alarm the neighborhood. She testified that he struck her on the head with his hand, and bruised her severely.

WALWORTH, Circuit Judge, said a husband has no right to beat his wife or to inflict punishment upon her. But he may defend himself against her, and may restrain her from acts of violence towards himself and others, for he is accountable for her acts which injure others.

The jury being satisfied by other testimony that the prisoner had done nothing more than was necessary to defend himself, in this case, rendered a verdict of not guilty.

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THE QUEEN *v.* JACKSON.

L. R. (1891), 1 Q. B. 671.

ARGUMENT on the return to a writ of *habeas corpus*, commanding Edmund Haughton Jackson to bring up the body of Emily Emma Maude Jackson, his wife, taken and detained in his custody.

LORD ESHER, M. R.<sup>1</sup> In this case it is really admitted that this lady is confined by the husband physically so as to take away her liberty. The only question for us to determine is whether in this case we can allow that to continue. The husband declares his intention to continue it. He justifies such intention; and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement, in order to prevent her from absenting herself from him so as to deprive him of

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<sup>1</sup> Opinions were also given by Lord Halsbury, L. C., and Fry, L. J.

her society. A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. *Cochrane's Case*, 8 Dowl. 630, was cited as deciding that the husband has a right to the custody, such custody, of his wife. I have read it carefully, and I think that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if a wife were about immediately to do something which would be to the dishonor of her husband, as if the husband saw his wife in the act of going to meet a paramour, I think he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offence, he may imprison her, and it must go to the full length that he may perpetually imprison her. I do not think that this is the law of England. But, assuming that there is such a right, the question arises whether the way in which and the circumstances under which it has been exercised in this case are such that the law ought to give back

to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out of church, in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage, and falls on the floor of the carriage with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? The lawyer's clerk remains at the house, and a nurse is engaged to attend the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help keep watch over her and control her. That in itself is insulting. She goes to the window in the house, and, one of her relations being outside, the blind is immediately pulled down. I think that the circumstances of this seizure and detention were those of extreme insult, and I cannot think that it can be under such circumstances as these the husband has a right to keep his wife insultingly imprisoned until she undertakes to consort with him. In my opinion, the circumstances are such that the court ought not to give her back into his custody. He has obtained, it is true, a decree for restitution of conjugal rights;<sup>1</sup> but that gives him no power to take the law into his own hands and himself enforce the decree of the court by imprisonment. Formerly that decree might have been enforced by attachment for contempt; but that would have been an imprisonment by the court, not by the husband. The power of attachment in such cases is now taken away. The suggestion, therefore, must be that, though the court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the court. I think that the passing of the act of parliament which took away the power of attachment in such cases is the strongest possible evidence to show that the legislature has no idea that a power would remain in the husband to imprison the wife for himself; and this tends to show that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for

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<sup>1</sup> "It will readily be perceived that this court can deal with the controversy only so far as property is concerned. Over the conduct and acts of the parties, except with reference to their respective rights of property, and for the purpose of enforcing those rights when ascertained, this court can exercise no control. It has not jurisdiction to compel cohabitation where one party withdraws from the society of the other without justifiable cause nor to decree a restitution of conjugal rights withheld." — *Cruzer v. Douglas*, 4 Edw. Ch. (N. Y.), 433, 506.

in this case. If there is now a greater difficulty than there was in enforcing, or if it is now impossible effectively to enforce a decree for the restitution of conjugal rights, the legislature has caused this by act of parliament, and the legislature must deal with the matter. For these reasons I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back the custody of this lady to him.

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*Ante-nuptial Torts by the Wife.*

HAWK *v.* HARMAN.

5 BINNEY (P.A.) 43.—1812.

Upon the trial of this case, which was an action by Hawk and wife for slanderous words spoken of Elizabeth, the wife of Hawk, *dum sola*, by Catherine, the wife of Harman, (whether sole or covert at the time, the narr. did not state), the Common Pleas reserved the point, whether the husband is liable for slanderous word spoken by his wife before marriage. The verdict was for the plaintiff, forty shillings damages, and six cents costs; and the court, after argument upon the reserved point, set aside the verdict, and gave judgment of nonsuit, upon which this writ of error was brought.

TILGHMAN, C. J. The only question in this case is whether an action will lie against a man and his wife for slanderous words spoken by the wife before marriage. It is a question which does not admit of a doubt. The wife cannot be sued without her husband; and if the action does not lie against both, it follows that a woman by her own act may defeat the plaintiff's action, a principle not to be endured, unless a positive adjudication on the point could be produced in support of it. But the defendant in error relies on the general position to be found in some books of authority, that a man is liable to answer for his wife's contracts before marriage. To be sure he is, but it must not be inferred that he is not answerable for her torts also. The expressions do not necessarily bear that import, and in candid construction, they ought not to be so expounded. It would be attributing to respectable authors an unaccountable mistake, for there is not wanting express authority to the contrary. If a *feme sole* is sued for trespass, and marries, the action shall proceed against her, and if she is found guilty, judgment and execution shall be had against her alone without naming her husband. *Doyley v. White*, Cro. Jac. 323, cited in Buller's Ni. Pri. 22.



But if this suit is brought after the marriage, for a trespass committed by the *feme* while *sole*, it shall be against the husband and wife, and what is somewhat singular, the writ charges the trespass as having been committed by both, because there is no other form of writ in the register. It was so decided 22 Ass. pl. 87, Jenk. Cent. 23, pl. 43, cited in 4 Vin. 185, C. 1, pl. 14. So if a *feme* disseisoress marries, the writ against the husband and wife shall be, *quod disseisiverunt*, and not *quod uxor dum sola disseisivit*. In these cases there was no question about the action lying against the husband and wife; the only doubt was, whether the form of the writ was right. I am therefore of opinion that the judgment should be reversed, and judgment entered here for the plaintiff below on the verdict.

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*Post-nuptial Torts by the Wife.*

KOSMINSKY *v.* GOLDBERG.

44 ARK. 401.—1884.

SMITH, J. This action was against the husband alone for defamatory words spoken by the wife. The complaint did not show whether the defendant was present or absent at the time the slander was uttered; and a demurrer to it was sustained for non-joinder of the wife. The plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband; but the amendment was stricken out. By this action we understand the court to have decided that the amendment stated no case materially different from that which had already been adjudged insufficient, and to have insisted that the wife be brought in as a party. The plaintiff declining to plead further, and electing to rest on his amended complaint, final judgment was entered dismissing the action.

For the wife's torts, committed during coverture, the husband is responsible. Such torts may be committed under either of the following circumstances: 1. Where the husband is absent and had no knowledge of the intended act, as in *Head v. Briscoe*, 5 Carr. & Payne, 484; (24 E. C. L. R. 667), where a man was held answerable for a libel published by his wife, although they were permanently living apart. See, also, *Catterall v. Kenyon*, 3 Q. B. 309; 40 E. C. L. R. 749. 2. Where the husband is absent, but where the tort is done under his direction and instigation, as in *Handy v. Foley*, 121 Mass. 259. 3. Where the husband was present, but the wife acted of her own volition, of which *Cassin v. Delaney*, 38 N. Y. 178, is an

example. And 4. Where the tort is committed in the company of the husband, and by his command or encouragement; for instances of which see *Daily v. Houston*, 58 Mo. 361; *Brazil v. Moran*, 8 Minn. 236.

In the first three cases they are jointly liable, and the wife must be joined. She is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either spouse before judgment recovered, the liability of the husband ceases. He is joined because she cannot be sued alone. But in the last case supposed, the law considers the tort as committed by the husband, and he alone is liable. To exempt her from liability, however, requires the concurrence of his presence and his command. A wrong done by his direction, but not in his company, does not excuse her; nor does his presence, if unaccompanied by his direction. The rule is stated too broadly in 2 Kent's Com. 149, where it is said, "If committed in his company, or by his order, he alone is liable."

Here the injury is alleged to have been done in the husband's presence, but not at his instigation. Yet his presence raises a presumption that she was acting under compulsion. And therefore the complaint states *prima facie* a cause of action against him alone. Of course this presumption may be rebutted by proof that he did not authorize or influence her act. Pomeroy's Remedies, sec. 320; Bliss on Code Pleading, sec. 85.

The presumption of coercion, arising from the mere presence of the husband in the case of crimes, has been abolished by statute, and the excuse has been left to be made out by proofs. Gantt's Dig. sec. 1233; *Edwards v. State*, 27 Id. 493.

Judgment reversed, with directions to require defendant to answer the amended complaint.

### *Torts to the Wife.*

#### LAUGHLIN *v.* EATON.

54 ME. 156.—1866.

BARROWS, J. To this action for malicious prosecution upon a charge of adultery, the defendants seasonably pleaded in abatement the coverture of the plaintiff.

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The presiding judge found for the defendants, sustained the plea and ordered the writ to be abated, to which order plaintiff excepts.

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The well-known general doctrine of the common law is, that where a wrong is committed against the person of the wife during coverture, as by beating her, slandering her reputation, or by malicious prosecution, she cannot sue alone. For injuries to the wife occasioning to the husband a deprivation of the society of his wife, or of her assistance in his domestic affairs, or by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife or expense in her cure, or if she be maliciously indicted and thereby separated from him, or he put to expense in her defence. But if the action is brought for her personal suffering and injury, the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action for which the husband alone would be entitled to recover. 1 Chitty's Pl. 46, 47, 61. *Horton & ux. v. Byles*, 1 Siderfin, 387; *Russel & ux. v. Corne*, 1 Salkeld, 119; *Hyde v. Scyssor*, Cro. Jac. 538.

When an injury is done to both, as slander or battery of husband and wife, separate actions must be brought, one by the husband alone for the injury to him, and one by the husband and wife for the injury to her. If both causes of action are joined, it is error. *Ebersoll v. Krug & ux.*, in error, 3 Binn. 555. There is nothing in this case which brings it within any known exception to the general rule above stated. John Laughlin has not been banished or abjured the country, or deserted his wife and gone beyond seas. So far as appears, he is still in frequent communication with her, supplying her with funds and only temporarily, though long absent.

In *Gregory v. Paul*, 15 Mass. 30, cited for plaintiff, the wife of a foreigner, deserted by her husband in a foreign country, who had thereafter maintained herself as a single woman, and lived for five years in Massachusetts, her husband never having been within the United States, was holden competent to sue as a *feme sole*. Sec. 10, chap. 61, of the R. S. of 1857, embodies the doctrine thus laid down, with some additions, as the law of this state. It is unnecessary to contrast the case of *Gregory v. Paul* with the one at bar, or consider further under what circumstances the absence of the husband from the state will excuse his non-joinder in a suit of this description.

Nor do our other statutes authorizing married women in certain cases to maintain suits as if sole, enlarge the plaintiff's rights in a suit like this. Under sec. 3, ch. 61, a married woman, may, if she pleases, prosecute suits at law or in equity for the preservation and protection of her property as if unmarried, and may maintain an action in her own name to recover the wages of her personal labor, not performed for her own family.

But it was determined by this court, in *Ballard & ux. v. Russell*, 33 Maine, 196, that the statute enabling her to sue for the preservation and protection of her property did not extend to rights of action for tort to the person.

The plaintiff's counsel urges that, if enabled to sue in her own name, without joining her husband, for the protection of her property, much more ought she to have that power for the protection of her liberty and reputation, when her husband is out of the jurisdiction, or his consent cannot be had to join in the suit.

The argument would be appropriately addressed to the legislature.

The present state of the law requires that the entry in this case should be

Exceptions overruled.

APPLETON, C. J., KENT, WALTON, DICKERSON and DANFORTH, JJ., concurred.<sup>1</sup>

## STROOP v. SWARTS.

12 SERG. & R. (PA.) 76.—1824.

THIS was an action brought by Jacob Strop and Mary, his wife, in the Court of Common Pleas of Perry county, to recover damages for slanderous words, alleged to have been spoken of the wife by Swarts, the defendant in error. The plaintiffs had a verdict in the court below for \$175, but the court, on motion of the defendant's counsel, arrested the judgment, for which reason the present writ of error was sued out. On the case being called up for argument in this court, Penrose, for the defendant in error, alleged and proved, that before errors were assigned, Mary Strop, one of the plaintiffs in error, was dead. He therefore moved that the writ of error be abated, and cited, *Boas v. Hiester*, 3 Serg. & Rawle, 271; 1 Chitty, Pl. 61.

Wadsworth and Metzger, *contra*, referred to 1 Binn. 172.

*Per Curiam.* In this case, there was no judgment for the plaintiffs in the court below, the judgment was arrested. Now, this court could not give judgment for the husband alone, even if they should think (which they do not), that the judgment ought not to have been arrested; because the wife, who was the meritorious cause, is dead, and the cause of action does not survive. If the wife had died after the judgment had been given for her husband and her, it would have been different. The judgment would then have survived to the husband.

Writ of error abated.

<sup>1</sup> See, also, *Wolf v. Baueres*, 72 Md. 481. Whether, under the Married Women's Enabling Acts, the wife in an action for personal injury to her, may recover for impaired earning capacity, see *Texas & P. Ry. v. Humble*, 97 Fed. 837, and dissent.



*Torts by Husband and Wife.*SIMMONS *v.* BROWN AND WIFE.

5 R. I. 299. — 1858.

THIS was an action of the case, brought by the plaintiff, as the owner of a water privilege and cotton mill thereon, in Johnston, against the defendants, husband and wife, for erecting a dam across the stream below, on the land of the wife, and thereby casting back-water upon the mill of the plaintiff; the declaration claiming damages for the loss of the profits of his manufacture by the plaintiff, during the period of time set forth, in which he was prevented by the obstruction from using his mill. One count in the declaration alleged, that the dam of the defendants had been reduced under a decree of this court, in equity, upon a bill filed against them by the plaintiff; the action being now brought to recover the damages caused by the unlawful raising of the dam.

BRAYTON, J. \* \* \* The defendant's counsel requested the court to charge the jury that Abby Brown, being a married woman, and the wife of the other defendant charged, and being owner of the fee of the land upon which the dam was built, and the premises being in the possession of the husband, no action could be maintained against her, and no verdict could be rendered against her. This instruction the court declined to give; and the defendants now move for a new trial for this, as error.

It cannot be material to this point, that the wrongful act was committed on land owned by the defendant, Abby Brown. There is no principle suggested, and certainly none can be found, that should thus change the character of the acts of the defendants. The locality of the act is not that which can impress upon it a wrongful character. It is equally injurious to the plaintiff, whether it be done on the defendant's land, or done upon the plaintiff's. Equally immaterial is it, that the act was done upon land in the possession of the husband, and for the same reason. The locality of the act in these particulars can have no other effect, at most, than as a matter of evidence of the extent to which the wife participated in the acts of the husband. The question, therefore, which is here made is, whether a married woman can be jointly guilty with her husband of a wrong of this kind; in effect, whether she can be guilty with him of any trespass; for whether the injury arising from it be direct or consequential, cannot be material.

In *Marshes Case*, 1 Leon. 312, it was held, that where goods came to the wife alone, and both husband and wife were charged with converting them, the action might be maintained. *Baldwin v. Mar-*

*tin*, Owen, 43, was also an action of trover against husband and wife, alleging a conversion by both, to her use, and was held good. In *Berry and Wife v. Nevys*, Cro. Jac. 661, it was held, that though the joint conversion was well, yet that the conversion must be alleged to be to the use of the husband, since it could not enure to the use of the wife. It was conceded that the action was open to this objection only. In *Draper v. Fulkes*, Yelv. 165, 166, which was trover against husband and wife, the allegation was that the goods came to both, and that they converted them. The objection to a recovery in this case was that it charged a conversion on both, and that a *feme covert* could not convert; and Yelverton answered, and the court allowed, that "the action is grounded not upon property, but possession only; and the point is the conversion; and she may as well be charged, as in trespass or disseisin." *Moorefoot v. Chenes and Wife*, 2 Ld. Raym. 1395, was *scire facias* against the defendants as administrators, and alleged the wasting of the goods of the intestate by both; and this point was made, that the wife could not be guilty. It was nevertheless held good; for that the wasting of the estate was a tort and though a *feme covert* might not convert, yet she might waste, which was a tort; and this decision was affirmed in the House of Lords.

In *Smalley v. Kerfoot and Wife and Others*, Andrews, 243, the case was trespass for entering the plaintiff's house and taking his goods, and converting them to their proper use. In this case it was conceded that the action would well lie against both husband and wife for the trespass. There was a judgment by default, and an assessment of damages. The point made was upon a motion in arrest of judgment, for that the declaration alleged a conversion to the use of the wife. This case was argued a second time at the request of the judges, and upon this argument it was conceded that for a battery or other personal wrong committed by baron and feme, the wife is liable to an action as well as the husband, but as to the conversion, it could not be to her use. The point made was overruled because the conversion was not the gist of the action, but matter of aggravation merely. In *Anon.* 1 Vent. 93, the declaration alleged an assault and battery by both husband and wife, and the husband was found not guilty. There was a motion in arrest of judgment, for that, it being a battery by the wife alone, he should be joined for conformity only; but the motion was overruled. But the general doctrine, as well settled, is stated in *Chitty's Pl.* 83, that husband and wife may be joined in all actions in which two or more persons may be jointly guilty, and may be charged jointly. This ground for a new trial must be also overruled, and there must be judgment upon the verdict.

*Torts as Between Husband and Wife.*ABBOTT *v.* ABBOTT.

67 ME. 304.—1877.

PETERS, J. The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort, for such an injury, instituted after divorce, be sustained by her against her former husband? We have no doubt that it cannot be maintained.

Precisely the same question was lately before the English court, and the decision and the reasons on which the decision is grounded meet with our unqualified approval. *Phillips v. Barnet*, 1 Q. B. D. 436. It is there held that the wife, after being divorced from her husband, cannot sue him for an assault committed upon her during coverture. In the course of the discussion in that case, Lush, J., says: "Now I cannot for a moment think that a divorce makes a marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case;" Field, J., says: "I now think it clear that the real substantial ground why the wife cannot sue her husband is not merely a difficulty in the procedure, but the general principle of the common law, that husband and wife are one person;" and Blackburn, J., states the objection to be "not the technical one of parties, but because, being one person, one cannot sue the other."

The theory upon which the present action is sought to be maintained is, that coverture merely suspends and does not destroy the remedy of the wife against her husband. But the error in the proposition is the supposition that a cause of action or a right of action ever exists in such a case. There is not only no civil remedy, but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended. Divorce cannot make that a cause of action which was not a cause of action before divorce. The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

The doctrine advocated by the plaintiff finds no support from any of the principles of the common law. According to the oldest au-

thorities, the being of the wife became, by marriage, merged in the being of the husband. Her disabilities were about complete. By the earliest edicts of courts, he had a right to strike her as a punishment for her conduct, and her only remedy was, that "she hath retaliation to beat him again if she dare." And Chancellor Kent lays down the doctrine, not contradicted or challenged in any of the editions of his commentaries, that, "as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce." 2 Kent Com. 180. But there has been for many years a gradual evolution of the law going on, for the amelioration of the married woman's condition, until it is now, undoubtedly, the law of England and of all the American states, that the husband has no right to strike his wife, to punish her, under any circumstances or provocation whatever. See, upon this subject, the cases collected in a learned and instructive note to the case of *Commonwealth v. Barry*, in 2 Green's Cr. L. Reports, 286. Still, the state of the old common law serves to show the basis upon which the marriage relation subsisted; and we do not perceive that there has been, either by legislative enactment or by the growth of the law in adapting itself to the present condition of society, any change in that relation which can afford the plaintiff a remedy. So to speak, marriage acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other. As said by Settle, J., in *State v. Oliver*, 70 N. C. 60, "it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."

We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of *habeas corpus*, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce. If a divorce is decreed to her, she has dower in all his estate, and all her needs and all her causes of complaint, including any cruelties suffered, can be considered by the court, and compensation in the nature of alimony allowed for them. In this way all matters would be settled in one suit as a finality.

It would be a poor policy for the law to grant the remedy asked for in this case. If such a cause of action exists, others do. If the wife can sue the husband, he can sue her. If an assault was action-



able, then would slander and libel and other torts be. Instead of settling, a divorce would very much unsettle all matters between married parties. The private matters of the whole period of married existence might be exposed by suits. The statute of limitations could not cut off actions, because during coverture the statute would not run. With divorces as common as they are nowadays, there would be new harvests of litigation. If such a precedent was permitted, we do not see why any wife surviving the husband could not maintain a suit against his executors or administrators for defamation, or cruelty, or assault, or deprivations that she may have wrongfully suffered at the hands of the husband; and this would add a new method by which estates could be plundered. We believe the rule, which forbids all such opportunities for law suits and speculations to be wise and salutary and to stand on the solid foundations of the law.

The plaintiff invokes the case of *Blake v. Blake*, 64 Maine, 177, as supporting her right to sue. That was a suit in assumpsit. In matters of contract there may be a cause of action during coverture, not enforceable by the ordinary methods until afterwards. The common law has been so far abrogated by the force of various legislative acts as to allow contracts to be made by husband and wife with each other. And, to a certain extent, contracts between man and wife always were upheld in courts of chancery. That case, therefore, differs from this.

Then, if the husband is not liable, the question arises whether the codefendants are liable in this action. We think it follows from the previous reasoning that they are not. The true test as to their liability is, whether an action could have been maintained against them at the time of the act complained of. It is clear that no action was then maintainable. If the co-defendants had been then sued, the action must have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. Husband and wife must declare that the injury was *ad damnum ipsorum*. She cannot, at common law, sue in her own name alone, nor in his without his consent. She cannot appoint an attorney, ordinarily, but he must do it for her. His conduct and admissions can affect the suit. He can release the cause of action and she cannot. She could do no act to redress an injury to her without his concurrence. Nor has the common law been changed in any of these respects until 1876; which was after this action was commenced. Laws of 1876, ch. 112. The damages recoverable in an action would have belonged to him, and not to her. And, at the same time, if she had committed a tort, he would have

been civilly liable for it. It is very certain, therefore, that no action could ever have been sustained against them in his name. They merely aided and assisted him. But if there was no injury to him there was none to her. They were one. Without doubt, after the death of the husband, a wife may maintain an action in her own name for a wrong committed upon her while her husband was alive, if no action was instituted nor the cause of action released during his lifetime; and undoubtedly the same right follows after a divorce *a vinculo matrimonii*.

But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds after death or divorce to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive. Here there was none. A thing cannot continue after an event which does not exist before. It would not be the survival of a claim, but would be one newly created. *Norcross v. Stuart*, 50 Maine, 87; *Marshall v. Oakes*, 51 Maine, 308; *Ballard v. Russell*, 33 Maine, 196; *Laughlin v. Eaton*, 54 Maine, 156; *West v. Jordan*, 62 Maine, 484; *Hasbrouck v. Weaver*, 10 Johns. 247; *Snyder v. Sponable*, 1 Hill (N. Y.), 567; *Bacon Ab. Baron and Feme*, K.; *Shaddock v. Clifton*, 22 Wis. 114.

Plaintiff nonsuit.

APPLETON, C. J., WALTON, DICKERSON and VIRGIN, JJ., concurred.

BARROWS, J., concurred in the result.

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### *Torts to the Husband in His Marital Relation.*

#### SKOGLUND *v.* MINNEAPOLIS STREET RY. CO.

45 MINN. 330.—1891.

ACTION brought in the District Court for Hennepin county, to recover \$3,400 damages for injuries to plaintiff's wife. The plaintiff appeals from an order by Lochren, J., refusing a new trial after a dismissal ordered at the trial.

GILFILLAN, C. J. The plaintiff and his wife, while riding in one of defendant's cars, were both at the same time injured by the same accident or act of negligence of defendant. Plaintiff brought an action and recovered for the injury to himself. He brings this

action alleging the negligence of the defendant, the injury to his wife, in consequence whereof he lost her services and society, and was put to expenses for physicians and medicines and the care of his wife. In its answer the defendant alleged the former action and recovery by plaintiff in bar of this action, and the court below held it a bar, and ordered judgment for defendant on the pleadings. This appeal is from an order denying plaintiff's motion for a new trial. The case raises the question, Was the cause of action in the first action the same as in this? Is this an attempt to recover damages that belonged to that cause of action? We think the decision of the court below was erroneous, not because one action was to recover for an injury to what are termed the absolute rights of plaintiff, and the other for injury to his relative rights, or rights he possessed by reason of his relation to his wife, but because his right to recover in this case will depend on a different state of facts from those which would sustain a recovery in the other case. In the action for injury to himself all he needed to show, in order to recover nominal damages at least, was the negligence of the defendant and the consequent injury to himself. But proof of the negligence and injury to the wife would not sustain the husband's action in this case. The cause of the action which those facts alone show belongs to the wife. Those facts go to make up the husband's cause of action, but alone they are not enough. In addition to them there must exist the fact that, by reason of the injury so caused, he has been deprived of her society or services, or has been put to expense. Such loss is of the substance of his cause of action. As said in *Todd v. Redford*, 11 Mod. 264: "Husband and wife cannot join in assault and battery *per quod consortium amisit*, for the *per quod* in such case is the gist of the action." In other words, the gist of the husband's cause of action on account of an injury to his wife is not the injury itself, but the consequence of the injury in depriving him of his common-law right to her society or services, or in imposing on him the common-law duty to care for her. A case may easily be imagined where, for an injury to her person, a cause of action—a technical cause of action at least—would instantly accrue to the wife, but where none would ever accrue to the husband, for the reason that none of the above injurious consequences to his relative rights would follow. Where a cause of action arises from a wrongful injury, it arises at once; and in such case the subsequently ascertained or developed consequences of the injury are items that might exist without them. But in an action by a husband on account of an injury to his wife, the consequences of loss of her society or services are not items of damages pertaining to an already existing cause of

action, or to a cause of action which might exist without them, but they are essential to the cause of action itself, which cannot arise until such consequences have followed the injury. If it could be said that the plaintiff's cause of action in his first action arose upon the negligence alone, then all the injurious consequences of that negligence, the injury to his person, the loss of his wife's society and services, caused by the injury to her person, might be regarded as items of damage in that cause of action. But no cause of action could accrue upon the negligence alone. That cause of action accrued only upon injury to his person caused by the negligence, and, when they concurred, his cause of action was complete. The loss of his wife's services had no connection with that injury. That cause of action was not a consequence of it, and not an item of damage pertaining to it. His right to recover for such loss was independent, and would have existed had that cause of action not accrued.

We have been able to find but two cases in the United States analogous to this. In *Cincinnati, etc. R. Co. v. Chester*, 57 Ind. 297, the plaintiff had joined in one count a cause of action for an injury to himself with a claim for damages for loss of services of his wife, and for expenses in healing injuries to his child; the three having been injured at the same time by the same negligence of defendant. On defendant's motion to require plaintiff to state the separate claims for damage in separate counts or paragraphs, the Supreme Court held the motion properly denied, saying: "It seems to us \* \* \* they would really constitute but a single cause of action." *Town of Newbury v. Conn. etc. R. Co.*, 25 Vt. 377, was an action by the town to recover damages it had been compelled to pay for an injury to the person caused by a defect in a highway which, as between it and the town, defendant was under a duty to keep in repair. Husband and wife were at the same time injured in consequence of the defect. The husband sued the town for the injury to himself, recovered judgment, which the town paid, and sued and recovered against defendant for that. The husband also sued the town and recovered judgment on account of the injury to his wife, and the town paid it, and sued defendant for it. The defendant pleaded in bar the former recovery against it. Speaking of the recovery against the town on account of the injury to the wife, in reference to the recovery for injury to the husband, the court, Redfield, C. J., said: "For it is as much a distinct matter as if the persons had been strangers to each other, and as much, I think, as if the persons had been injured at different times, by reason of the same neglect of defendant." The two cases seem directly opposed to each other, though neither is particularly



satisfactory as an authority. So far as they determine the question here involved, the latter is more consistent with principle.

Order reversed.<sup>1</sup>

## RINEHART v. BILLS.

82 Mo. 534.—1884.

MARTIN, C. On the 26th day of January, 1880, the plaintiff filed a complaint in equity against the defendant. In this complaint another party was originally included as defendant, but was discharged before trial. The object of the suit was to enjoin the transfer and collection of a certain promissory note in the sum of \$550, made by the plaintiff, to enforce its surrender and cancellation, and obtain a judgment for a part payment indorsed upon it. It is alleged in the petition that the note was without consideration, and was obtained by false representations, by threats of suit, and of personal violence. The defendant, in his answer, denied the allegations of the petition and recited the facts constituting the consideration of the note, which, in his own language, read as follows:

“Defendant, further answering, says: That on or about the 11th day of November, 1879, he learned for the first time that plaintiff, for a long time thereto, to wit, for eighteen months, then last past, had been making love to his (defendant's) wife, whenever and wherever he could meet her. That he had plied every art and used every device in his power to win her love and esteem and to alienate and estrange her from her husband. That he had told her, at divers times and places, that he loved her deeply, devotedly, madly, and that he could not live without her. That plaintiff had written her love-letters on divers occasions; had given her a fine gold finger-ring, and desired to leave and abandon his own wife and children, and take defendant's wife and go to a new country where they would not be known, and could marry and live together as man and wife.

<sup>1</sup> In *Kujek v. Goldman*, 150 N. Y. 176 (1896), it is held that one who, in the belief that a woman is virtuous, is induced to marry her by the false representations of a third person, by whom she is at the time pregnant, may maintain an action for damages against the wrongdoer upon the broad ground of the loss of *consortium*, to which the husband is entitled, and of which, by the fraud complained of, he has been deprived.

In *Holleman v. Harward*, 119 N. C. 150, 25 S. E. Rep. 972, it is held that an action for damages will lie at the suit of a husband against a druggist who, in violation of the express orders of the husband, has sold laudanum to the wife, in consequence of which she has become a confirmed subject of the opium habit, resulting in the loss of her services and companionship.

That plaintiff was rich and would maintain her in luxury and ease, and she could live like a lady without labor and toil. Defendant, further answering, states that plaintiff, by his persistent efforts, finally succeeded in alienating and estranging the love and affections of defendant's wife from defendant, and procured, in the manner and by the means aforesaid, her consent to leave and desert her husband and elope with plaintiff."

The answer goes on to recite that she had relented her rash promise to elope with plaintiff, had confessed everything to her husband, and begged to remain with him as his wife under the security of pardon and forgiveness. It is further alleged in substance that the defendant, smarting under the wrongs inflicted upon him by the plaintiff, repaired to the plaintiff's residence with his attorney, with a view of settling for these wrongs without suit; that in the interview the plaintiff admitted the facts as charged against him, and agreed to pay defendant, in liquidation of all damages by him sustained, and in final settlement thereof, the sum of \$600; that he paid down \$50 and gave the note in controversy for the remaining \$550, payable four months from date; that he afterwards paid \$205 on account of the note, which payment was endorsed on the same. The answer concludes with a prayer that the injunction be dissolved and judgment be rendered in defendant's favor, in the amount of the note remaining unpaid, which is stated to be \$345 with interest.

The plaintiff interposed a demurrer to this answer, which was overruled. The case was then tried by the court without the intervention of a jury. The court found the issues in favor of defendant, declaring in its decree that the matters and allegations in plaintiff's petition are untrue and not sustained by the evidence. The injunction was dissolved and the sum of \$40.05 was assessed as damages on the injunction bond against the plaintiff and his sureties. It was also adjudged that defendant recover of plaintiff the balance due on the note sought to be enjoined. The bill of exceptions does not contain the evidence, but merely recites that evidence was submitted by both parties tending to prove the allegations of their pleadings.

Only one question is presented to us in the record, for determination. The question involves the sufficiency of the defence, and is raised on the demurrer and in the motions made after judgment. The plaintiff contends that as the answer fails to show that defendant's wife had been actually debauched or seduced away from him, no wrong had been inflicted upon him, for which an action lies; and that the note taken in settlement of the supposed wrong was void as being without consideration. This position cannot be maintained

upon either principle or authority. The injury to defendant consists in the alienation of his wife's affections with malice or improper motives. Debauchery and elopement when they occur are only the immediate and legitimate consequences of the wrong. That the injury in this instance did not culminate in adultery and elopement, is a fact not due to the plaintiff's forbearance, but to the wife's prudent reflection and laudable repentance. The alienation of the wife's affections, for which the law gives redress, may be accomplished notwithstanding her continued residence under her husband's roof. Indeed it has been not unfrequently remarked by authors and jurists, that such continued residence after the alienation has been effected, so far from leaving the husband without a good cause of action, contributes an aggravation to his injury, from which an elopement might well be accepted in the nature of an alleviation. Schouler's Dom. Rel. 57; Cooley on Torts, 224; *Hoard v. Peck*, 56 Barb. 202; *Heermance v. James*, 47 Barb. 120.

I think it would be difficult to regard it in any other light in the absence of contrition or change of heart. The demurrer admits the salacious and seductive solicitations of the plaintiff, extending over a period of eighteen months. It also admits the fact of actual estrangement and alienation which constitutes the essence of the offence. Everything which follows afterwards can be only in the nature of aggravation, mitigation or reparation of the wrong inflicted upon the sanctity of the defendant's home.

I may add here by way of allusion to the consideration of the note, that the compromise of a doubtful claim asserted in good faith, furnishes a valuable consideration to support a promise. 1 Par. Cont. 438, sec. 4 (6th ed.)

The judgment is affirmed. All concur.<sup>1</sup>

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#### FOOT v. CARD.

58 CONN. 1.—1889.

**ACTION** for the alienation by the defendant of the affections of the plaintiff's husband.

PARDEE, J. \* \* \* For the sole purpose of testing the sufficiency of the pleadings the defendant admits by her demurrer that from 1872 to this present she has alienated from the plaintiff the conjugal affection of her husband, induced him to withhold from her his conjugal society, and herself has since lived in continual adultery with him. She denies, however, that the law has any form or mode of redress

<sup>1</sup> *Contra*, that no action will lie merely for alienation of affections, *Houghton v. Rice*, 174 Mass. 366.

for this wrong. The case is reserved for the advice of this court as to the judgment to be rendered.

So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle this right in the wife is equally valuable to her, as property, as is that of the husband to him.

Her right being the same as his in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages.

In 3 Blackstone's Commentaries, 143, the reason for such denial is thus stated. "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; therefore, the inferior can suffer no loss or injury."

Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage, being admitted, then comes into operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentality, and it will furnish a mode for obtaining adequate redress for every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law because of her inferiority.

In *Lynch v. Knight*, 9 House of Lords Cases, 589, the wife, with whom the husband was joined for conformity, complained that the defendant, a man, had alienated from her the conjugal affection of her husband and deprived her of his conjugal society by falsely asserting to him that she had been guilty of unchaste conduct; and asked damages. The defendant had judgment for the reason that the court was of opinion that the statement by the defendant to the



husband did not, as a fact, occasion the alienation of affection and consequent separation complained of. In dismissing the case for this reason the lord chancellor said: "Although this is a case of first impression, if it can be shown that there is presented to us a case of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. \* \* \* The loss of conjugal society is not a pecuniary loss, but I think it may be a loss which the law may recognize to the wife as well as to the husband." Lord Cranworth said: "In the view I take of this I do not feel called upon to express a decided opinion on this point. I believe your lordships are not all agreed on it; and I will therefore only say that I am strongly inclined to think that the view taken by my late noble friend" (the lord chancellor) "was correct."

Wherever there is a valuable right and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation. A technicality must not be permitted to work a denial of justice. The defendant has no possible interest in requiring the husband to be co-plaintiff, other than that she should have security for her costs in this suit, and be protected from a second judgment upon the same cause of action in his name. As she is in no danger of a second judgment, and can compel the plaintiff to give security for costs, it is simply an empty technicality which she here interposes. There are good reasons for the rule that the husband should join in a complaint for damages resulting from an injury to the person, property, reputation or feelings of the wife in every case other than that before us. Whenever in any of these she suffers, presumably he suffers; he has a direct pecuniary interest in the result; and the defendant is entitled to protection from a second judgment. But, in the case before us, it is the pith and marrow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society to her, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which from the nature of the case it is impossible for the husband to suffer injury; for which it is impossible for him to ask redress either for himself or for his wife. To ask in his name would be to plant the seeds of death in the cause at the outset, and the law does not compel those who have suffered wrong so to ask for redress as to insure denial.

In a case of this kind the wife can only ask for damages by and for herself; the law cannot make redress otherwise than to her solely,

apart from all others, especially apart from her husband. For no theory of the law as to the merger of the rights of the wife in those of the husband could include her right to his conjugal affection and society. Although all other debts and rights to her might go to him, there yet remained this particular debt from him to her absolutely alone and beyond the reach of the law of merger. So long as she on her part kept the marriage contract no interest in this right can be taken from her; the husband cannot acquire any interest in it; she cannot transfer any.

Of legal necessity, therefore, damages for injury to this right must be to her solely. If the law should permit the husband to share therein, it would be to the extent of such share to deny justice. This the law may not do. Moreover, even if it be so that upon the recovery of damages by the wife for this injury to her sole right, the law would give to the husband the custody thereof as her trustee, that would not be a sufficient answer to the action in its present form.

It is the contention of the defendant that the admission by the plaintiff, that she and her husband are still living together, is an admission that she now has and enjoys all that the marriage contract can, or intended to, secure to her; and that she has neither in law nor in fact suffered any injury. But this admission is to be considered in the light of that made by the defendant, namely, that she has during the last fifteen years lived in continual adulterous intercourse with the husband—an intercourse procured by her influence over him. Upon this admission it becomes certain that whatever may have been the measure or quality of the remnant of conjugal affection and society permitted to the plaintiff by the defendant, as a matter of fact, and of law as well, the plaintiff has been deprived of the conjugal affection and society which the marriage contract entitled her to enjoy and required her husband to give; and that a valuable right, absolutely sole in her and incapable of division, has been injured.

It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of her right to redress is absolute; it can not be made to depend upon any of these conditions. As long as she keeps her marriage contract, so long she has the right to the conjugal society and affection of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price of redress for injuries in the past. Upon the pleadings

there is a valuable right in the wife solely, and an injury thereto for which damages must be given to her solely, notwithstanding the fact that she is living with her husband; therefore, the law cannot refuse its assistance. The rules of law which the defendant invokes for her protection are not applicable to the case. The Superior Court is advised that the complaint is sufficient and that the plea in abatement is insufficient.

In this opinion all the other judges concurred.<sup>1</sup>

### BIGAUETTE *v.* PAULET.

134 MASS. 123.—1883.

**TORT** in four counts. The first count was for seduction of the plaintiff's wife; the second and fourth were for assault upon her; and the third was for a rape: whereby the plaintiff lost her comfort, assistance, society and benefit.

The judge below ruled that, as there was no evidence to support the count charging the defendant with seducing the plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to the plaintiff, the action could not be maintained; and directed a verdict for the defendant. The plaintiff alleged exceptions.

**W. ALLEN, J.** The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word *consortium*—the right to the conjugal fellowship of the wife,

<sup>1</sup> "Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could with the slightest plausibility be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better considered cases nor by the abler text-writers that she did not herself possess the substantive right upon which the cause of action was founded."—ELLIOTT, C. J., in *Haynes v. Nowlin*, 129 Ind., 581, 584. Accord, that action will lie, *Wolf v. Frank*, 92 Md. 138.

*Contra*, *Hodge v. Wetzel*, 69 N. J. L. 490, and the Me., Wis., Mo., Fed. and Ont. cases cited therein.

to her company, coöperation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences, and in such cases the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the others, the author's words are, "If it be a common assault, battery or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill-usage, *per quod consortium amisit*; in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matters of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the *consortium* is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 C. & P. 198; *Yundt v. Hartrunft*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where



the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the husband with an action of assault and battery for the injury done to him, though it be with the consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78; 2 Ld. Raym. 809; Holt, 50. See, also, Bac. Ab. Trespass, C. 1; and Marriage, F. 2; 2 Chit. Pl. 13th Am. ed. 855. Reeves' Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind,—that the corrupting of the body, rather than the mind of the wife, was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the *consortium* with the wife which is implied from criminal conversation with her, whether with or against her will.

Exceptions sustained.

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### KROESSIN *v.* KELLER.

60 MINN. 372.—1895.

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages, following, in a general way, the common-law form of declarations in crim. con. A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that the plaintiff has been

deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought crim. con., and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts, 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him. Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law the female could not even give her consent to the adulterous acts, and, as a result, it was no defence in this form of action that the defendant had been enticed into criminal conversation through the acts and practices of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defence that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defence for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule.

We have been cited to quite a number of cases determined in the courts of last resort in this country, in which it has been held, without much stress being laid on statutes concerning the rights of married women, that an action may be maintained by a wife against one who wrongfully induces and procures her husband to abandon and send her away. *Westlake v. Westlake*, 34 Ohio St. 621, the court being divided in opinion, is a leading case on this view of the subject. A later one, announcing the same doctrine, but made to rest much more on the married woman's acts in the state of Michigan, and similar to our own, is *Warren v. Warren*, 89 Mich. 123, 50 N. W.

842. The plaintiff's counsel has been industrious in collecting this class of cases in his brief, and to them we add *Price v. Price* (Iowa), 60 N. W. 202. But even on this proposition, and despite broad statutory enactments affecting the rights of married women, the courts are not entirely agreed, for in Maine and Wisconsin it has been held that such an action cannot be maintained. *Doe v. Roe*, 82 Me. 503, 20 Atl. 83; *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522. But we need not decide as between these cases, for the exact question raised by the demurrer here was not the one under consideration in any we have cited. They were brought for enticing away the husband; causing him to withdraw his support from the wife; to abandon or desert her,—an entirely distinct and separate cause of action from that set out in the plaintiff's complaint. At common law this form of action was wholly different in pleadings and proof, as well as parties, from crim. con. It proceeded, and still proceeds, upon different grounds, and we do not regard cases of that nature as authority in this. We are not unmindful of the fact that plaintiff's counsel has presented two cases—*Seaver v. Adams* (N. H.), 19 Atl. 776, and *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389—in which it is held that an action by a wife against another woman, based on a complaint very much like this, will lie. But in these cases the authorities before referred to are cited and relied on as directly in point. The courts rendering these decisions do not seem to have considered that there is, and inevitably must be, a marked distinction between an action charging a defendant with having induced and enticed a husband to withdraw his support from his wife and to abandon and desert her, and one similar to crim. con. We think the difference noticeable and material, although we do not wish to be understood as holding that the one first mentioned will lie. That question is not before us, and we simply express our conviction that a wife cannot maintain an action in the nature of crim. con. Such actions would “seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured.” The power to bring such actions would furnish wives “with the means of inflicting untold misery upon others, and little hope of redress for themselves.” We find nothing in our statutes in respect to the rights of married women which indicates that the power to proceed in this form of action was intended to be conferred. Attention has been called to G. S. 1894, sec. 5530 (Laws 1887, c. 207, § 1). We have heretofore had occasion to comment upon that act, and have not changed our views as then expressed. *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018.

Order reversed.<sup>1</sup>

<sup>1</sup> For distinction between alienation of affections and criminal conversation, see *Hollister v. Valentine*, 69 App. Div. (N. Y.) 582.

GOLDMAN *v.* COHEN.

30 MISC. 336. — 1900.

(SUPREME COURT, NEW YORK, SPECIAL TERM.)

RUSSELL, J. The defendant demurs to the complaint, which seeks recovery by a wife for the loss she sustained as a wife by the injury to her husband from the negligence of the defendant in the management of a horse. Her loss is that which usually occurs to a wife from the illness of a husband in the deprivation of support and consortium, and the need of her personal care for him during his sickness. No case is cited where the wife recovered upon such a claim; and the absence of precedent where such demands might have been numerous, if sustained by the law, goes far to the belief that such negligence has never yet been embraced within the circle of causes of action, recognized by law, beyond the right given to the injured one, and its survival to the consort and next of kin in the event of his death.

It is true that this century just closing has seen, with our own State foremost in the advance, the adoption by unwritten and statutory law of juster and wider views of the wife's existence as a human being, by the emancipation of her person from "the moderate chastisement" of the husband, and the protection of her rights of property; but her interest in the husband's life and companionship is not a right of property, or derived from a contract of bargain and sale. That interest lies in a region into which the law does not enter except when necessity compels.

It does recognize invasion by willful misconduct. It inflicts heavy damages upon the enticer or seducer. But this is for punishment and atonement rather than compensation. It comes within the range of concurrent and supplementary adjuncts to the criminal law for the prevention and redress of wrongs.

The fault of negligence rarely demands a greater remedy than mere compensation. The right of action is remedial, — not punitive. It reaches not out to those indirectly suffering by impairment of domestic relations, to give to dependent wife or child pecuniary equivalent. So far as the law can, it neutralizes such indirect losses by compensation to the husband and father, thus giving him the means of supplying the loss in earning power and expenses of sickness, and so avoids double or triple recoveries for the same elements of compensatory damages by different persons against him whose fault only gives ground for one restitution. The breach of a con-



tract obligation directly affects the power of the husband to give solace and comfort to the wife; but she may not have a personal right of action except where the law does allow her to be the moving cause to invoke the courts to punish destruction of marital rights.

Judgment for defendant, on demurrer, with costs.

*Crimes by the Wife.*THE STATE *v.* MA FOO.

110 Mo. 8.—1891.

DEFENDANT was indicted under the name of Annie Baker. Under this name she prayed a change of venue, and, upon it being granted, she signed bond for appearance in Franklin Circuit Court. In the Franklin court she alleged her true name was Annie Ma Foo, and the proceedings were afterwards conducted accordingly.

She was indicted at the January term, 1891, of St. Louis Criminal Court, for mayhem under section 3488. The indictment was in three counts, the first two for mayhem differing only in the corrosive fluid used, and the third charged a felonious assault. At the close of the testimony the state entered a *nolle prosequi* as to the third count, and appellant was convicted upon the second, her punishment being assessed at five years' imprisonment in the penitentiary.

After unsuccessful motions for new trial, and in arrest, she was duly sentenced in accordance with the verdict, and from this judgment she appealed.

GANTT, P. J. \* \* \* But the defendant earnestly contends that the court erred in not qualifying the seventh instruction by adding thereto these words: "There was no evidence that the defendant's husband disapproved of the acts of defendant, and, unless that fact is established, the jury should acquit the defendant." And in refusing instruction, numbered 5, prayed in her behalf to the effect that if her husband was present the jury must acquit her.

The court gave the following declaration: "7. The court instructs the jury that the evidence in this case is sufficient to show that the defendant, at the time of the alleged commission of the crime, was a married woman, and the wife of Ma Foo. Now, even though you may believe, from the evidence, that the defendant committed the crime as charged in the indictment, yet, if you further believe that she committed the crime in the presence of her husband, Ma Foo, and that he was present at the time when she threw the fluid, then the law, in the absence of other and further culpatory and explanatory evidence against the defendant herself, presumes that she acted under the immediate coercion of her husband, and, in such case, you will find the defendant not guilty. This presumption of law, however, that a wife acting in the presence of her husband is acting

under his coercion, and that she is, therefore, not guilty of a crime committed in his presence, is *prima facie* only, and may be rebutted by other proper evidence in the case. And if, in this case, you believe from all the testimony before you that the defendant was the sole acting party, and committed the crime as charged without any incitement on the part of her husband, and without his consent, or that the defendant was the sole instigator of the crime, and committed the same as charged in the indictment, then you will find the defendant guilty, even though you may believe that her husband was present when she committed the act."

A married woman's responsibility for crime, committed in the presence of her husband, is variously stated by the text-writers.

Blackstone, in his Commentaries, book 1, page 444, says: "And in some felonies, and in some inferior offences committed by her through constraint of her husband, the law excuses her; but this extends not to treason or murder." And in his fourth book he says: "And she will be guilty in the same manner of all those crimes which, like murder, are *mala in se*, and prohibited by the law of nature." See, also, Russell on Crimes [9th ed.], p. 34.

From a close examination and comparison of the cases and the text-writers, the general rule admitted by all seems to be, that if a wife commit any felony, with the exception of murder and treason, and perhaps some other heinous felonies, in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and is, therefore, excused. 1 Bennett's Leading Criminal Cases, 81; *Commonwealth v. Neal*, 10 Mass. 152; 1 Bishop's Criminal Law, 452; *State v. Williams*, 65 N. C. 398.

But the authorities are equally agreed that this presumption is only *prima facie*, and rebuttable. So it is said in Russell on Crimes, pages 32, 33, "But this is only a presumption of law, so that if, upon the evidence, it clearly appear that the wife was not drawn to the offence by her husband, but that she was the principle inciter of it, she is guilty." "And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of murder, treason or robbery in company with, or by coercion of, her husband, she is punishable as if she were sole." And this is the doctrine of all the states in the United States. 1 Wharton on Criminal Law, sec. 79; *Seiler v. People*, 77 N. Y. 411; *Tabler v. State*, 34 Ohio St. 127; *Uhl's case*, 6 Gratt. 706; *State v. Williams*, 65 N. C. 398; *Miller v. State*, 25 Wis. 384.

In Arkansas, by force of a statute, the presence of the husband merely is no defence to the wife, unless it "appear from the circum-

stances in the case that violence, threats, commands or coercion were used." *Freel v. State*, 21 Ark. 212.

It will be observed that learned counsel for defendant desire us to ingraft an additional modification on this rule of evidence, and require the state to go further, and prove that the husband not only was not the inciter or responsible criminal agent in the commission of the crime, but that he actually disapproved it, and, in the absence of evidence of his disapproval, the wife must be acquitted. This is not the law. There is little in the present organization of society upon which the *prima facie* presumption itself can stand, and certainly nothing calling for any extension of the presumption.

The statutory rule in Arkansas, *supra*, is more in accord with the spirit of the age in which we live. In New York, by the Penal Code of 1881, secs. 17 and 24, the presumption is entirely abolished.

In this case, if the wife is guilty at all, she, alone, committed the criminal act, which forever deprived the boy of his eyesight. By her own evidence she exonerates her husband of all complicity in the crime. There is not a semblance of constraint. Her responsibility was fairly submitted to the jury. The instruction gave her the full benefit of the presumption, and the jury must have found that she was neither coerced nor constrained by act, deed or word of her husband to do what she did, but that she acted from her own free will. Had the act resulted in death, under the common-law authorities she would not have been entitled to the benefit of the presumption of constraint.

What difference there is in the principle between the culpability of one who, on purpose and of malice aforethought, destroys the sight of a little child, and one who kills, we leave to others to state. We confess we are unable to formulate any. The defendant has been fairly tried, and the jury have convicted her. This was their peculiar province. We can but regret for the sake of humanity that she could not have been shown innocent of the charge. At this distance, it is hard to conceive of such a crime by a woman, and that woman a mother, with so little provocation or motive.

The remarks of Mr. Harvey did not transcend the bounds of legitimate argument. He expressly subordinated his own views of the law to those expressed by the court in its instructions.

Finding no error in the record, the judgment is affirmed. All concur.<sup>1</sup>

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<sup>1</sup> See *Commonwealth v. Daley*, 148 Mass. 11, as to violation of the excise law, by the wife, "in the presence of" the husband.



*Crimes as Between Husband and Wife.*THE STATE *v.* BANKS.

48 IND. 197.—1874.

BUSKIRK, C. J. The appellee was indicted in the court below for grand larceny. The indictment charged that the defendant, on the 10th day of October, 1871, unlawfully and feloniously did steal, take, and drive away two horses, one mare, one colt, one wagon, one set of harness, and one grindstone, the personal goods of John Hensicker.

The issue formed upon the plea of not guilty was submitted to a jury for trial, which resulted in a verdict of not guilty.

The court instructed the jury as follows: "It appearing, from all the evidence in the case, that the goods were taken by the defendant with the consent of the owner's wife, under an agreement with her that he was to dispose of the same and account for the proceeds to her, and there being no evidence tending to show that there was any adulterous intercourse, actual or contemplated, between the defendant and said wife, you will return a verdict of not guilty. To the giving of this instruction, the State, by her prosecuting attorney, excepted, and now prosecutes this appeal, to obtain the opinion of this court as to whether the instruction was correct.

It is insisted by the counsel for the State that the instruction was erroneous, upon two grounds:

1. That it misdirected the jury as to the law applicable to the case.
2. That, conceding the instruction properly expressed the law, the court erred in giving it, because it usurped the functions of the jury.

In Hawk, P. C., lib. 1, chap. 33, sec. 32, the law is stated thus: "It is certain that a *feme covert* may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's, because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife, as he may by taking away the wife by force and against her will together with the goods of the husband." In *Regina v. Featherstone*, Dearsly, 369; s. c. 6 Cox, C. C. 376, and 2 Ben. & H. Leading Cases, 362, Lord Campbell said: "The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle

that the husband and wife are, in the eye of the law, **one person**; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases."

We have made a careful examination of the authorities, and they very clearly establish the following propositions:

1. The wife cannot be guilty of stealing the goods of her husband, she residing with him and having the possession of the goods by virtue of the marriage relation.

2. When adultery is neither committed nor intended, a person is not guilty of larceny in aiding a wife in taking away her husband's goods.

3. Where adultery has been committed or intended, the adulterer may be convicted of receiving the goods of the husband from the wife, or in aiding the wife in carrying away the goods of the husband.

4. Where an adulterer takes goods jointly with the wife, he may be guilty of larceny.

5. Where the wife alone takes property of the husband to her adulterer's lodgings, he cannot be convicted on mere evidence that the property is in his lodgings.

6. An adulterer is not guilty of larceny if he merely assist the adulteress in carrying away her necessary wearing apparel.

It is not necessary for us to lay down as law that, supposing a stranger stole the goods of the husband, and the wife was privy to it and consenting, such privy and consent would, if there was *animus furandi* in the stranger, exonerate him from what would otherwise be larceny. Nor do we express any opinion as to whether a wife, who has become an adulteress, and carries away the goods of her husband or assists her paramour in carrying away the goods of the husband, may not be convicted of larceny. See 2 Bishop, Crim. Law, secs. 873, 874; Whart. Crim. Law, secs. 1803 to 1806; and 2 Ben. & H. Lead. Cases, 358 to 370, where the leading English and American cases are cited and reviewed.

We think the instruction was correct as matter of law. Besides, the appellee was the brother of the wife, and the entire transaction shows that there was no felonious purpose at the time the property was taken away.

A court in charging a jury has no right to assume the guilt of the accused, or that a fact has or has not been proved, or to express any opinion or manifest a leaning upon evidence which should be submitted to the jury; but when there is no evidence, or none upon a particular point, upon which a conviction could be based, the

court has a right to say so, and direct the jury to find the defendant not guilty. This was such a case.

The court committed no error in giving the instruction complained of.

The judgment is affirmed.<sup>1</sup>

### *Capacity of the Husband or Wife to Testify for or Against Each Other.*

#### COMMONWEALTH v. SAPP.

90 Ky. 580.—1890.

CHIEF JUSTICE HOLT. Upon the trial of William Sapp upon the charge of attempting to poison his wife, the state offered her as a witness against him, avowing by its attorney that it would prove by her she had seen the accused sprinkle a substance upon a piece of watermelon intended for her, and that the portion of it produced at the examining trial and then shown to contain arsenic, was a part of the piece prepared for her, and was, when so produced, in the same condition as when she got it from him. It is claimed the attempt was made in August, 1888. Afterward, and before his trial, they were absolutely divorced. The court refused to permit her to testify, holding that she could not be a witness for any purpose; and whether this is so is the main question now presented.

It is a general rule of the common law, based upon public policy and because of identity of interest, that neither a husband nor wife can testify for or against the other; and some authorities hold that where this relation has once existed, the one is inadmissible for or against the other, even after the relation has ceased, as to any and all matters that occurred during its existence. They follow Lord Alvanley, who said, in the early case of *Monroe v. Twisleton*, Peake's Ad. Cas., 219, that the divorced wife is a competent witness to prove any fact arising after the divorce, but not to prove anything which happened during coverture. Thus Mr. Wharton says: "If a woman be divorced *a vinculo matrimonii*, she cannot prove a contract, or anything else which happened during coverture. Any fact arising after the divorce she may prove." 1 Wharton's Crim. Law, sec. 744.

It is, perhaps, questionable whether some of the writers to this effect do not mean that the divorced wife cannot testify as to any

<sup>1</sup> See also *People v. Cole*, 43 N. Y. 508. As to arson, see *Snyder v. The People*, 26 Mich. 106.

matter occurring during coverture, if her knowledge as to it arose by reason of the marital relation. It was held in *The State v. Phelps*, 2 Tyler's Reports, 374, that a woman, although divorced absolutely, is not a competent witness upon an indictment against her former husband for a crime committed during the coverture, but the court so announced without any argument in the opinion of the question. Cases may, however, be found where courts of high authority have held that a widow may testify against the administrator of her husband as to any facts which she did not learn from the latter, or which did not come to her knowledge by reason of the marital relation, although relating to the transactions of her husband. 1 Greenleaf on Evidence, sec. 338; *Babcock v. Booth*, 2 Hill, 181.

In the case last cited the court said: "The policy of the law only excludes her when her answer will be a violation of the confidence which existed between the husband and wife while the marriage relation continued;" and in *Ratcliffe v. Wales*, 1 Hill, 63, which was an action for crim. con. with the plaintiff's wife, it was held that while a divorced wife is generally incompetent to testify *against* the husband as to facts occurring during the marriage, yet she was competent to prove the charge *for* him, although the act occurred during the existence of the marriage. We fail to see any reason for a distinction, whether she be called as a witness for or against him.

It was held by this court, in *Storms, etc. v. Storms, etc.*, 3 Bush. 77, that the testimony of a husband, after the wife has been divorced from him, is competent against her, if it divulges no communication, between them during coverture. In *English's Adm'r v. Cropper*, 8 Bush. 292, the testimony of the widow of the intestate was offered by his administrator to prove facts which came to her knowledge during the coverture, but not by reason of her confidential relation as wife.

It was urged that our then existing law (1871) provided that husband and wife should not testify for or against each other, and that, construing it by the reasons of public policy, which, before its adoption, disqualified them from so testifying, it should be held to exclude them after the dissolution of the marriage by divorce or the death of one of them; but this court said: "Neither the literal import of the language of the Code cited nor any principle of policy or propriety will exclude a surviving wife or husband from testifying to facts known by the witness from other means of information than such as result from the marriage relation, where, as in this case, the witness is not otherwise incompetent, although the testimony may relate to transactions of the deceased husband and wife."

Our statute, adopted in 1872, and which, in substance, so far as it



bears upon the question we are now considering, is again found in sec. 606 of the Civil Code, appears to be declaratory of these decisions of this court. It says: "Neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards, provided, however, that in actions where the wife, were she *feme sole*, would be plaintiff or defendant, the wife may testify or her husband may testify, but both shall not be permitted to testify." General Statutes, edition 1883, page 414.

This provision was considered in the case of *Elswich v. The Commonwealth*, 13 Bush. 155, where the husband was indicted for a felony, but not one against the wife, who had been divorced before the trial; and it was decided that inasmuch as she had been divorced, she was a competent witness for him to prove facts which came to her knowledge while the marriage relation existed, but not confidentially or by means of her situation as wife. Unquestionably, information obtained by the husband or wife during the marital relation by reason of its existence should not be disclosed, even after the relation has been dissolved. Whether this rule may be relaxed so as to permit the wife to testify against the husband by his consent has been, to some extent, a mooted point, but in this country it has generally been denied. Its importance to the interests of society, protecting, as it does, the peace and harmony so vital to the most intimate of all relations, cannot be overestimated. Its disregard would throw open to the public gaze all that privacy of married life which tends to cement the relation and destroy, in great degree, if not altogether, that mutual confidence and dependence, the one upon the other, so necessary to its existence. Discord and misery would reign where peace and concord are so necessary. In the language of an eminent legal writer: "The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, even though the other party be no longer living." 1 Greenleaf on Evidence, sec. 337.

If the proposed testimony violates marital confidence in the slightest degree, or tends, however slightly, to impair the rule for its protection, the highest considerations forbid its introduction. The word "communication," therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or *vice versa*, but

should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates to the transactions of the one or the other; therefore, the rule should not be applied in such a case. What the state proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused. If she had not then been his wife, ordinary observation would have enabled her to know all that it was proposed to prove by her. But we think it was competent upon another ground. It was evidence relating to an alleged attempt at felony upon the wife. The rule that husband and wife cannot testify for or against each other is subject necessarily to some exceptions, one of which is, where the husband commits or attempts to commit a crime against the person of the wife. *Stein v. Bowman, etc.*, 13 Peters, 221. It was never doubted but what she could exhibit articles of the peace against him. Roscoe says: "It is quite clear that a wife is a competent witness against her husband in respect to any charge which affects her liberty or person." Roscoe's Criminal Evidence, p. 150.

In an English case, where the husband attempted to poison the wife with a cake into which arsenic had been introduced, and the wife was admitted to prove that her husband gave her the cake, it was held by the twelve judges that the evidence was rightly admitted. *Rex v. Fagger*, Rus. Crimes, 632.

In 1 Wharton's Criminal Law, sec. 769, it is said: "Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence;" and in the case of *The State v. Hussey*, 1 Bush. 123, the judge, in delivering the opinion, said: "The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated on her, and we would say for an assault and battery which inflicted or threatened a lasting injury or great bodily harm."

In the case of *The People v. Northrup*, 50 Barb. 147, the husband was on trial for administering poison to the wife, and she was admitted as a competent witness.

The policy upon which the rule that the husband and wife cannot testify for or against each other is based is so far overcome as to create the exception by that superior policy which dictates the pun-

ishment of crime, and which, without the exception to the rule, would very likely go unpunished. It is of necessity. If it be said that our statute forbids the introduction of the husband or wife as a witness against the other, we reply, and so did the common law; and yet the exception named existed, and so it should, in our opinion, under our statute. The necessity of the case requires such a construction, and, as already said, the statute forbidding husband or wife to testify against each other is but declaratory of the common law. As the divorced wife would have been a competent witness if she had still been the wife of the accused at the time of the trial as to the alleged attempted felony upon her, it follows, *a fortiori*, that being divorced did not disqualify her. The accused was allowed to introduce testimony tending to show that the wife was unchaste. She had not testified as a witness, and it is difficult to see upon what ground this was permitted. It is not supposable that a court acted upon the idea that unfaithfulness upon her part of her marital vows authorized her husband to poison her. The evidence was incompetent.

The case of *Turnbull v. The Commonwealth*, 79 Ky. 495, is overruled in so far as it conflicts with this opinion.

This opinion is ordered to be certified to the lower court as the law of the case.<sup>1</sup>

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<sup>1</sup> See, also, *Whipp v. The State*, 34 Ohio St. 87

## CHAPTER IV.

### DIVORCE AND SEPARATION.

#### *Jurisdiction.*

#### DITSON *v.* DITSON.<sup>1</sup>

4 R. I. 87. — 1856.

PETITION for divorce. The petition represented the petitioner as of Little Compton, in the State of Rhode Island, and that she had resided within the state for the last three years; that she was married to George L. Ditson, in the city of New York, in October, 1842; that she has at all times faithfully performed her duties as a wife, but that her said husband has treated her with extreme cruelty; has neglected and refused, being of sufficient ability, to provide necessities for the subsistence, and has wilfully deserted her for the last three years, and been guilty of other gross misbehavior and wickedness repugnant to, and in violation of, the marriage covenant; that her said husband is not within this state, nor within fifty miles of Newport. Prayer, for a decree of divorce from the bond of matrimony between the petitioner and her husband, and that the name of the petitioner be changed from her name of Mary Ann Ditson, to her maiden name of Mary Ann Simmons, and for further relief.

Accompanying the petition was an affidavit of the petitioner, stating that her husband was not a resident of this state, and was in parts unknown to the petitioner. The petition was filed in the clerk's office of the Supreme Court for the county of Newport, on the 9th day of July, 1856; and the clerk certified that he had given six weeks' notice of the application by publishing it in the Newport Mercury for that period next before the sitting of the court at the present August term.

It appeared that the petitioner, then Mary Ann Simmons, was married, without the knowledge or consent of her father, whilst a girl at school in New York, to George L. Ditson, an Englishman, to whom she had been introduced outside the school, the ceremony being performed by Dr. Spring on the 13th of November, 1842; that after marriage, Mr. and Mrs. Ditson went to Europe, and from

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<sup>1</sup> "Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of *Ditson v. Ditson*, 4 R. I. 87." — Cooley. Constitutional Limitations, 6th ed. note.



thence to Cuba, where they resided for several years; that shortly after their return, Ditson went to Europe by himself, leaving his wife, then in a feeble and emaciated condition, without any provision, to be supported by her father, and was gone about two years; that he returned, however, and lived with her again for a short period, treating her morosely and unkindly; but there was no proof of extreme cruelty, though he locked her up once in her chamber for making a purchase that displeased him, and treated her with neglect and spoke of her in a careless and indifferent manner. The last time he left her was in Boston, whence he went to Europe, saying just before he went, to a witness, "that he meant to go away, and did not care a damn for Boston or anybody in it." Upon being thus deserted the petitioner came to live with her father at Little Compton, R. I., of which place he was a native, and then a domiciled inhabitant. Ditson had been absent, at the time of filing the petition, for upwards of three years, during which time he had not once communicated by letter or message with his wife, or left, or made, any provision for her support, though of sufficient ability to do so. From the time of his desertion the petitioner had lived with her father in Little Compton, except about three months of the time, which she had passed in Newport, R. I. During this time she had been wholly supported by her father, except in what manner did not appear, the little she had been able, by her own exertions, to do for herself. It was admitted that Ditson had never been domiciled in Rhode Island, or even, to the knowledge of any witness, been within the state. It was not known that he had any domicile in the country; he having resided since the marriage either in Europe or Cuba, and having remained but a short time either in Boston or New York. No personal notice of the application for divorce had been given to him, and none attempted to be given, since, from his silence, the place where he resided or temporarily dwelt, was wholly unknown to the petitioner or to her friends.

Under these circumstances the chief justice intimating a doubt concerning the jurisdiction of the court over the cause, desired the counsel for the petitioners to search authorities and present them to the court upon that subject; the court being satisfied that the petitioner had proved by the desertion of her husband without cause, and by his neglect to provide for her support, being of sufficient ability so to do, a case for divorce *a vinculo* under the statute, provided the court had, under the circumstances proved, power and jurisdiction to grant her petition.

AMES, C. J. The "act regulating marriage and divorce" in this state, requires, in words, no other jurisdiction in this court over the

parties to a petition for divorce, than that the petitioner should have *resided* in the state for *three years* next before the preferring of the petition, with a discretionary power in the court to dispense with *that particular term*, as it has been construed, of *residence* or *domicile*. Dig. 1844, p. 265, sec. 11. Public laws since Dig. 1844, p. 670. This dispensing power has, however, been very sparingly exercised by the court, and never, unless indeed the court may have been misled by false testimony, except in cases where a long previous residence, and especially by natives of the state, had been interrupted but a short time within the three years preceding the petition, or, in which some peculiar circumstances loudly invoked the aid of the court, such as an open adulterous marriage by the wife, the petitioning husband having resided in the state for a long portion of the three years, and the court being satisfied that he came to the state, not for the purpose of divorce, but *bona fide* to reside here, as a domiciled or settled inhabitant. Of late years, it has never been dispensed with where the alleged cause of divorce, occurring in another state, was not a cause for the species of divorce asked, in *that* state. There is nothing, however, in the statute, as we regard it, which *obliges* the court to take jurisdiction of such a petition merely because one of the parties only, the petitioner, is a resident of the state, though he or she may have been such for the period of three years next preceding the petition, although, it must be admitted, that the practice under the statute has proceeded upon that supposition. By the 10th section of the act of this state "regulating marriage and divorce," this court is authorized "by rule or otherwise to prescribe the notice to be given on petitions for divorce, alimony, separate maintenance, and custody of children, and may issue such process as may be necessary to carry into effect the powers conferred on them by this act." Dig. 1844, pp. 264, 265. By the 14th rule of the court, made by the authority of this act, "On all petitions for divorce, the adverse party, if resident within this state, or within fifty miles of the place of trial, shall be notified and served with a copy of such petition, three weeks at least before the sitting of the court, and if resident without the state, and more than fifty miles from the place of trial, notice shall be given in some one of the public newspapers, printed in Newport or Providence, six weeks before the sitting of the court, and such petitions as contain an allegation that the adverse party is not resident in this state, or within fifty miles of the place of trial, shall be accompanied with an affidavit of the petitioner, stating his or her knowledge and belief of the place of residence of such adverse party." Rules of Sup. Ct. of R. I. prefixed to Vol. I, R. I. Reports, pp. xii and xiii. Under this rule, this court has acted in giving constructive

notice to non-resident defendants to petitions for divorce, in cases where relief of this kind has been asked by resident citizens, and has, upon proper proof, afforded that relief, even though the defendants have never resided within this state or subjected themselves in any way to its jurisdiction. If, however, it appeared from the affidavit of the petitioner or otherwise, in the course of the hearing, that the petitioner knew of the place of residence of the other party, and that place was within the United States, the practice has for many years been to continue the petition, and order personal notice of the pendency thereof to be given to such party through the mail. In the case at bar, under this rule, upon affidavit of the petitioner that, according to her best knowledge and belief, the defendant, her husband, doth not reside in this state, or within fifty miles of the town of Newport, but is in parts unknown, he being a foreigner, the notice prescribed by the rule has been given, by publication of the same, for the space of six weeks before the sitting of the court, in the Newport Mercury, a paper printed in the city of Newport. If, however, by the general law pertaining to this subject, a decree of divorce *a vinculo*, made here, be void elsewhere, unless both parties to the marriage are resident in this state at the time of the application, or the respondent has been served with notice in the state, or being served without notice out of it, has appeared and submitted himself to our jurisdiction, so far from feeling compelled by the language of our statute, as it stands at present, to pass such decrees, we should feel compelled to refuse to pass them, lest they should bring upon the resident petitioner, in such cases, greater evils than those which our statute was designed to remedy.

When, therefore, this question presented itself to the court for the first time since I had the honor of presiding over it, in the case at bar, my brethren on the bench, though less doubtful with regard to our jurisdiction in such a case than myself, consented, at my request, to reserve the question for mature consideration and deliberate decision, in order that the course now adopted might for the future guide ourselves as well as those subject to our jurisdiction. Every case, during our recent circuit, in which it has since arisen, has also been reserved; and the question having been argued before us by the counsel in this case, was already under consideration, when our attention was attracted by a remark of the learned chief justice of Massachusetts, in delivering the judgment of his court in the recently reported case of *Lyon v. Lyon*, 2 Gray, 367, decided in 1854, that this court, in its decree of divorce, reviewed and considered in that case, had violated, upon this subject, principles of *general law*. Such a remark, coming from a quarter entitled to so much respect, has only

induced us more carefully to scrutinize by the light of the *general* law the true grounds of jurisdiction in such cases; so that, however, in *ex parte* hearings of them, we may be occasionally misled as to *facts*, it may not be supposed that we are careless of, or would deliberately violate in this respect settled principles of law.

In the case of *Lyon v. Lyon*, *supra*, which was an application for divorce on the part of a husband residing in Massachusetts, a former decree of this court divorcing the same parties *a vinculo* on the application of the wife, was declared void, partly on the ground that it was obtained here by a domiciled inhabitant of Massachusetts in fraud of a statute of that state, which avoids divorces obtained out of the state for causes occurring in it, or for any cause which would not authorize a divorce by its laws, when obtained by a citizen of Massachusetts who goes "into any other state or country in order to obtain the divorce." We have no remark, except of approval, to make of the statute of Massachusetts, or of this decision under it, upon the facts made to appear *ex parte* to that court, probably quite different from the facts made to appear in the same matter before, *ex parte*, to this.

It is a well-settled principle of *general* law upon this subject that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has an *actual bona fide* domicile within its territory; and this holds, whether one or both the parties be *temporarily* residing within reach of the process of the court, or whether the defendant appears or not, and submits to the suit. This necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern. Bishop on Marriage and Divorce, sec. 721, p. 721, 2d ed. and cases cited. We entirely agree with the judgment given by the Supreme Court of Massachusetts on this point in the well-considered case of *Hanover v. Turner*, 14 Mass. 227, 231, in which both this rule, and the reason for it, are stated with that precision and largeness of view which indicate that the court fully comprehended the question before them as a question of general law; a kind of praise which cannot, with any justice, be bestowed upon many American cases upon this important and interesting subject.

Our attention has been attracted to the case of *Lyon v. Lyon*, because, in it, the decree of this court divorcing Mrs. Lyon is arraigned and declared void upon general principles of law apart from the statute, that is, as we understand it, apart from the principle of general law embodied in it. The learned court are made to



say that, "upon general principles of justice and policy," the decree in question would, "before the Revised Statutes," have been held void, "partly on the ground that it was a proceeding in fraud of our law," to which we agree upon the facts proved to the court, "and partly because the court of the foreign state (Rhode Island) could have no jurisdiction of the *subject-matter* and of *both* the parties." 2 Gray, 368, 369. And again, at the conclusion of the opinion, the court recur to the same matter: "But if not within the statute, *for the reasons before given*, we are of opinion that the decree in question is void upon general principles of law." *Ib.* 370. By this we understand that the learned court must have intended — *First*, that by the general law applicable to the subject of divorce the Supreme Court of Rhode Island had no jurisdiction of the *subject-matter* either because *the marriage* took place, or because *the alleged cause of divorce* occurred out of its jurisdiction; and, *Second*, because the court had not jurisdiction of *both* parties, the husband not being domiciled in Rhode Island, and no effectual service upon him *within the state* having been obtained, and he, by appearance, not having submitted his cause to the jurisdiction of the court.

With regard to the alleged want of jurisdiction over "*the subject-matter*," which includes, as distinct from jurisdiction over the parties, only the marriage and cause of divorce, we think that there must be some inaccuracy in the language of the report. We think so, because, as said by Judge Story, "The doctrine now *firmly* established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts, to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or to the place where the offence for which the divorce is allowed was committed." Story's Conflict of Laws, sec. 230a; and Bishop on Marriage and Divorce, sec. 720, and note 2, where see a very instructive note, containing all the authorities, domestic and foreign. See also *Ib.* §§ 740, 741, &c. We think so, more especially, because, as we understand the scope of his reasoning, no one has vindicated this doctrine of American law with more ability than the present learned chief justice of Massachusetts, in delivering the judgment of his court in the case of *Harteau v. Harteau*, 14 Pick. 181, 185, 186. We regard, therefore, the alleged want of jurisdiction in Mrs. Lyon's case, on the ground of want of jurisdiction over *the subject-matter* as something distinct from want of jurisdiction over *both parties*, as a mere inaccuracy of statement, the court intending, perhaps, that, not having jurisdiction over *both parties*, the Supreme Court of Rhode Island had neither jurisdiction

over the *marriage* nor the *delictum* — that is, over the *subject-matter*. It is true that in *Barber v. Root*, 10 Mass. 265, 266, a case referred to by the learned court in *Lyon v. Lyon* for the grounds of their judgment, stress seems to be laid upon the place of contract and of the place of the violation of it, as affording or not affording ground for jurisdiction, as the case might be, over the *subject-matter*, partly upon the idea of the subsistence or non-subsistence of the contract within the territory of the court taking jurisdiction, and partly, so far as the *delictum* was concerned, upon some notion of police. We understand, however, the Supreme Court of Massachusetts to have rejected both these false and confused notions; and in *Hanover v. Turner*, 14 Mass. 230, 231; *Harteau v. Harteau*, 14 Pick. 182-187, incl., and therefore in *Lyon v. Lyon*, 2 Gray, 368-370, to be understood as regarding marriage not as an executory contract between the parties to it, but as an universally recognized relation between them, deeply affecting their *status*, or legal and social condition, and for that reason properly dissoluble according to the law of the country in which they are domiciled, without reference to the law of the place of the original contract of marriage, out of which the relation has emerged. We also understand the result of these decisions to be, that a breach of the duties of this relation, though sometimes a crime, and when such, punishable in that character only in the place where it is committed, yet considered as a cause of divorce, to have no locality and, therefore, to be regarded as a cause of divorce, wherever occurring or committed, equally as if it had occurred or been committed within the territory of the state having jurisdiction over the *parties*, in the sense of *both* parties to the relation.

We may remark in passing, although we do not mean to launch into the sea of conflict on this subject between the laws of England and Scotland, that whilst it is the doctrine of both the Scotch and English courts, as well as of our own, that the place where the offence is committed, whether in the country where the suit was brought, or a foreign country, is immaterial to jurisdiction in divorce, it is the equally well-settled doctrine of the Scotch courts that the *place of marriage* is also immaterial; and this doctrine, as a doctrine of the Scotch law, has recently received the approbation of the House of Lords, sitting upon a Scotch appeal, if some doubt be not also thrown by the decision upon the peculiar doctrine of the English law, as held in *McArthy v. McArthy*, and supposed to be held in *Lolley's Case*, that an *English* marriage cannot be dissolved by a foreign tribunal. *Geils v. Dickenson*, 20 Eng. L. & Eq. R. 1, 10, 11, opinion of Lord St. Leonards; and see Bishop on Marriage and Divorce, §§ 745-761 incl., and cases cited.

The other principle of general law mentioned in the decision of *Lyon v. Lyon*, *supra*, as violated by this court in divorcing Mrs. Lyon, to-wit, that the court had not jurisdiction over *both* parties to the marriage, presents a more difficult question, and one which, as we have said, had attracted our attention previous to our knowledge of the above decision and opinion of the Supreme Court of Massachusetts.

The question raised by the case at bar, and for the decision of which, in the affirmative, this court is said by the Supreme Court of Massachusetts, in *Lyon v. Lyon*, to have pronounced a decree in favor of Mrs. Lyon, void upon general principles of law, is, whether the *bona fide* domiciliation of the *petitioning* party in this state, is sufficient to give this court jurisdiction to grant a divorce *a vinculo*, although the other party to the marriage to be dissolved has never been subject to our jurisdiction, never been personally served with notice of the petition within the state, or appeared and answered to the petition, upon constructive notice, or upon being served with personal notice of it, out of the state? In other words, the question is, whether, as a matter of general law, a valid decree of divorce *a vinculo* can be passed in favor of a domiciled citizen of the state, upon mere constructive notice to the foreign or nonresident party to the marriage, against whom, or to dissolve whose marital rights over or upon the petitioner, the aid of the court is invoked? Such a question, as said by a late excellent writer upon this subject, can never arise in England, where this whole matter, so far as it is a matter of *judicial* determination, is committed to the ecclesiastical courts. Those courts have no power to dissolve marriages, good *ab initio*, for supervenient causes, and can only act for such causes upon suits for divorce *a mensa et thoro* and for restoration to marital rights, their jurisdiction in *jactitation* suits, being confined to the ascertainment of whether a marriage reputed or boasted of, ever existed, and in *nullity* suits, to the declaring marriages void, or avoiding them from the time of the decree, which from causes pre-existing the ceremony of marriage, were, by law, either void or voidable *ab initio*. The common law of their jurisdiction, as shown by the 106th canon of 1603, and afterwards enacted by statute, was, that no person could be cited out of his diocese; the court interfering in such matters, it is said, for the good of souls merely, and its jurisdiction being confined, with that of the bishop or ecclesiastical dignitary represented by it, to the care of the souls of those domiciled, or at least present, within the diocese. It is also held that the canon does not apply to persons having no fixed residence in the kingdom, but only to persons cited who are inhabitants and dwellers in some *diocese* or *district* placed by law under some particular

ecclesiastical jurisdiction, and that the statute does not extend to Ireland. Bishop on Marriage and Divorce, § 733, and p. 734, n. 2 2d ed. 1 Blacks. Com. 441, 442 and notes. 3 Ib. 92-95 and notes. 4 Ib. 275, 276, *vide passim*, N. Y. Ed. 1827. It is evident that the peculiar jurisdiction of these courts does not depend upon the *domicile* of the libellant, who, though a foreign or Scotch resident, may follow his wife, or she her husband, into the proper ecclesiastical tribunal of England for the appropriate relief to the case which it is empowered to give. The court must, however, have jurisdiction over the *defendant*, or its decree, from its nature, could have no personal effect upon him or her; but except the defendant *be domiciled* in some particular *diocese* or *district* it is apprehended that a *temporary* residence of the defendant in such district or diocese, is sufficient to give the court jurisdiction. In *Geils v. Dickenson*, 20 Eng. L. & Eq. R. 1, 9, 10, 13, 14, the marriage having taken place in England, between a Scotchman and an English woman, the parties were domiciled in Scotland, paying only occasional visits to England. They resided in Scotland until September, 1845, when the wife left her husband and returned to her mother's house in England. In October, 1845, the husband instituted, in the Arches Court of Canterbury, a suit for restitution to conjugal rights, to which the wife gave in a "responsive allegation," in which she stated various acts of cruelty and adultery committed by her husband in Scotland, and became an actor in the cause as well as a defendant, by praying that she might "be separated from bed, board, and mutual cohabitation" with her husband by reason of his adultery, and cruel and unnatural practices upon the person of the proponent. The arches court entertained both the original suit and the new action raised by way of defense in it, and finding the alleged adultery of the husband proved, divorced the wife, as she desired, from bed, board, and cohabitation with her husband, until they might be reconciled to each other, inhibiting both from contracting another marriage during the lifetime of the other. The ecclesiastical court in this case took jurisdiction at the suit of a plaintiff domiciled in Scotland, pursuing his wife thence to England for its relief against *her*, freshly returned to its jurisdictional district, and again upon her "responsive allegation," both as a *defendant* and *actor* in the cause, granting her a divorce. The wife subsequently raised an action for divorce *a vinculo* in Scotland, for the same acts of adultery by virtue of which she defended herself and obtained the divorce *a mensa et thoro* in England, which was granted by the court of session, and afterwards confirmed, on appeal, by the House of Lords; and although the only question, both below and above, turned upon the effect of the decree of the court of arches — that is, whether it



estopped her from further relief, or was legally consistent with it, — neither court nor counsel intimated a doubt as to the jurisdiction of the court rendering the decree. It is evident that from the peculiar principles which regulate the jurisdiction and action of the English ecclesiastical courts, in matters of divorce, very little light can be gathered to aid us in our investigation.

As a matter of general law this must be sought in the legal nature of marriage, and what it consequently is, upon which a decree of divorce operates, and in the jurisdiction of a state over its own citizens and subjects, as well as in the decisions of courts bearing directly upon this point, or elucidating the principles which govern its decision. It is undoubtedly true, as a common-law principle, applicable to the judgments of its courts, that they bind only *parties* to them, or persons in such relation to the parties and to the subject of the judgment, as to be deemed privies to it. The rule of this system of jurisprudence, which brings privies within the operation of the notice served upon the principals to a judgment and binds them by its effects, is founded upon quite as clear a policy, and is sanctioned by quite as complete justice, as that which renders the judgment obligatory upon those whom they represent. It is founded upon the great policy *ut sit finis litium*, and upon *the necessity*, to carry out this policy, that the future and contingent representatives of the parties in relation to the subject of the judgment should be bound by it. Again, there is no system of jurisprudence, which, founded as the jurisdiction of the court is upon the personal service of the subpœna, is more special in its requisition that all parties interested should be served in the suit, in order to be bound by the decree, than *that* administered by the English chancery; yet even in this court, from the same policy, and upon the same necessity, the *first* tenant in tail, or the first person entitled to the inheritance, if there be no tenant in tail living, or even the tenant for life, as the only representative to be found of the whole inheritance, by his appearance to the suit binds to the decree in it all those subsequently and contingently interested in the estate; the court, in administering this rule of representation of parties, taking care only that the representative be one whose interest in the subject of the suit is such as to insure his giving a fair trial to the question in contestation, the decision of which is to affect those who remotely or contingently take after him. Again, there is the large class of proceedings *in rem*, or *quasi in rem*, known especially to courts administering public or general law, and borrowed from thence into every system of jurisprudence, in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the juris-

diction of the nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding. This, too, is founded upon a necessity or high expediency, since, without it, a prize or instance court, for example, could not, so scattered or concealed are the parties interested, perform any of the functions for which, by the general or public law, it is set up. Proceedings of this nature must, we think, be familiar to the courts of Massachusetts; and probably not a day passes in which things within their jurisdiction are not, by direct attachment or garnishee process, seized, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying to them for relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since, otherwise, the state might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. Without doubt, in these and other like cases, the general law in dispensing with *personal* notice from necessity, requires some fair approximation to it, by representation, substitution, or at least such publicity, as under the circumstances is proper and possible, or the proceeding will be regarded as a fraud upon the rights of the absent and unprotected, a robbery under the forms of law, and so a fraud upon law itself. It is, however, a very narrow view of *the general law*, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those *within* its jurisdiction and entitled to its aid only by dispensing with personal notice to those *out* of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows, of the purposes to the forms of justice, might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of *general law*.

Now, *marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness though formed by a contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it

resembles in this, that it is formed *by* contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and as every nation and state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate *them*, and so the *legal* obligation of the relation which involves them, altogether. This it may do, with the exception above stated, as to some relations, by *law*, when it wills; declaring that the legal relation of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties or altogether dissolved through the judicial intervention of its courts. The right to govern and control persons and things within the state, supposes the right, in a just and proper manner, to fix or alter the *status* of the one, and to regulate and control the disposition of the other; nor is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the state diminished by the fact that there are other parties interested through some relation, in the *status* of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada — no treaty obliging his restoration — or who is brought by his master thence to a free state of the Union — no constitutional provision enforcing his return — finds his *status* before the law in the new jurisdiction he has entered, changed at once; and no one dreams that this result of a new domicile and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly

civilized portions of it. Yet each nation and state has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving this last relation, according to its right; and all that other states or nations, under the general law which pervades all Christendom can properly demand is, that in the exercise of its clear right in this last respect as to its own citizens or subjects, it should pay all, and no more attention, than is practicable to the competing rights and interests of *their* citizens and subjects. It should give to nonresidents and foreigners, parties to such a relation of general legal sanctity, as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action, as can, under such circumstances, be given consistently with any judicial action at all, efficient for the purposes of justice. To say that the general law inexorably demands *personal* notice in order to such action, or, still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.

It is very evident, upon examining the statutes of the different states of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it, to depend upon the place of the *contract*, some upon the place of the *delictum*, and some, as in this state, and as they should do, upon the *domicile* of the wronged and petitioning party. The courts of each state exercise, as they must, jurisdiction upon the principles laid down for them by statute, and have very little occasion, unless called upon to review the decree of some neighboring state, to attend to or consider any *general* principles pertaining to the subject. Engaged in this latter task they are very apt to confound the *statute* principles of jurisdiction, to which they are accustomed, with the principles of general law relating to it; notwithstanding the latter so obviously grew out of the right of every state to regulate, in some cases by law, and in others by proper judicial action, according to the nature of the subject, the social condition, or *status*, as it is called, of all persons subject to its jurisdiction. A singular instance of forgetfulness of this principle of "state sovereignty" is afforded by the case of *Hull v. Hull*, 2 Strobbart's Equity Appeals, 174, in which the right of the state of Connecticut to dissolve through its courts, under the law of that state, the marriage there formed between two of its own citizens



upon the petition of a wife whose husband had deserted her and her children and settled in South Carolina, constructive notice only having been given to the absent and absconding husband, was put upon the ground that dissolution of the *contract* of marriage upon such notice was part of the law of the place of the *contract* and so part of the *contract* itself. The courts of that state, it seems, whilst forgetting the state rights of their northern sister, strenuously insist upon the rights of their own; holding, according to the exploded notion of *Lolley's* case, or rather of *McArthy v. McArthy*, that a *South Carolina* marriage cannot be dissolved out of the state of South Carolina, although any other may. In *Irby v. Wilson*, 1 Dev. & Bat. Eq. R. 568, 576, under similar circumstances, except that in this case the *wife* was the *deserting*, and the *husband* the *petitioning* party, the Supreme Court of North Carolina held that a *Tennessee* divorce was *void*, upon the ground hinted at in *Lyon v. Lyon*, *supra*, to wit, that such a proceeding being *between parties*, and the wife having been constructively notified only, although such notice was all that was possible, the courts of Tennessee could not alter by way of redress the *status* of one of its own citizens, become burdensome to him by the alleged causeless and continued desertion of his wife. Upon the same principle, and for the same reason, of course, North Carolina could not relieve from the relation, its citizen, the wife, although her husband might have compelled her to flee from him to the only home open to her in that state, by the grossest violation of the duties which their relation to each other imposed; and thus, *both* these conterminous sovereignties would be powerless for justice, over and upon the call of its respective domiciled inhabitant. In Pennsylvania the jurisdiction is made to depend upon jurisdiction over the offender *at the time of the offense*. (*Dorsey v. Dorsey*, 7 Watts, 349), as if the *lex loci delicti* were to govern; in Louisiana, upon like jurisdiction, unless the marriage were contracted within the state, when, we suppose, the *delictum* would be regarded as a *breach of contract*, if such, by the law of Louisiana in which the contract was entered into. *Edward v. Green*, 9 La Ann. R. 317. Thus, we perceive, that by some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly local is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. Others, perceiving, that though a contract, it is one universally recognized, acknowledged the right of foreign tribunals to act upon it, provided that in doing so, they govern themselves not by the only law which they, it may be by *statute*, can administer, but ascertain whether it

has been broken, and so ought to be dissolved, by the law of the place of the contract. Some treat breaches of the contract of every degree as *quasi* crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled, and others, again, qualify this, by an exception in favor of the tribunals of the place of contract; since *there* the *delicta* can be treated as breaches of the contract, if such be the law of the place of contract. If marriage be a contract, or the breach of it a *tort*, it may well be asked, why are they not, at least, personal in their nature, and transitory in their legal character, passing with the wronged person wherever he or she passes, for redress by any tribunal of the civilized world, which can obtain jurisdiction of the person of the covenant breaker or trespasser?

It is evident that from such confusion of decisions and reasons, no general principle worth considering can, by any process, be eliminated. Raising ourselves above this mist of misapplied learning and ingenuity, and looking at the matter simply as it is, it is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world, that it gives rights, and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state and certainly every state of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister states; that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the *status* of its *own* domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that *status*, and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and, finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, *personally* subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the

case admits of, and the practice of courts in similar cases sanctions; the purpose of such notice being to banish the idea of secrecy and fraud in the proceeding by inviting publicity to it, as well as to give to persons out of the jurisdiction of the court, every chance possible, under the circumstances, of appearing to the proceeding and defending, if they will, their own rights and interests involved in it.

These views are supported by the practice of the states of Connecticut and Tennessee called in question, as we have seen, by the courts of South and North Carolina, as probably by the practice of many other states, and certainly by the long continued practice of our own. They are sanctioned by the well considered decision of *Harding v. Alden*, 9 Greenl. R. 140, and by that learned juriconsult, the late Chancellor Kent, in his note on that case, 2 Kent's Com. 110, n. b, 4th ed. They are otherwise best sustained by authority. *Tolen v. Tolen*, 2 Blackf. 407; *Guembell v. Guembell*, Wright, 286; *Cooper v. Cooper*, 7 Ohio, 238; *Mansfield v. McIntyre*, 10 Ib. 27; *Harrison v. Harrison*, 19 Alabama, 499; *Hare v. Hare*, 10 Texas, 355. See also the whole subject discussed in Bishop on Marriage and Divorce, *passim*, and especially in ch. 34 of that valuable work.

It may be added that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject have been wisely provided against by a clause of the constitution of the United States, and can find a remedy under it in the Supreme Court of the United States, as the court of last resort, in cases demanding its application. By art. 4, sect. 1, of the Constitution of the United States, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." As this has been construed by the highest authority to give in every other state the same effect to a judgment or decree of a state court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a state of a union, and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them.

Although as a general doctrine, the domicile of the husband is, by

law, that of the wife, yet when he commits an offence, or is guilty of such dereliction of duty in the relation, as entitles her to have it either totally or partially dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own ; and especially, if a native of the state to which she flies for refuge, is upon familiar principles, readily reintegrated in her old domicile. This is the well-settled doctrine of law upon the subject (Bishop on Marriage and Divorce, §§ 728-730 incl. and cases cited), and has by no court been more ably vindicated than by the Supreme Court of Massachusetts. *Harteau v. Harteau*, 14 Pick. 181, 185.

A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the court over her case, and to the question of her domicile in this state, can hardly be imagined than the case at bar. The petitioner is the daughter of a native of this state, who, though formerly resident in Boston, has for many years past been domiciled in his native place, Little Compton. Whilst at school the petitioner became acquainted with an Englishman of the name of Ditson, and in 1842, married him, without the knowledge or consent of her parents, in New York. Immediately after marriage the couple went to Europe, and from thence to Cuba, where they lived together several years. Upon their return to this country, she being in a feeble and emaciated condition, he deserted her for the first time in Boston, and was absent in Europe, without leaving any provision for her, for about two years. Upon his return, they appear to have lived together again, he, however, giving every indication of a morose as well as inattentive husband. After a short time he deserted her again in Boston, declaring, upon his leaving it for Europe that he cared nothing about it, or any person in it, pointing, as the testimony is put to us, to his unfortunate wife. He has been absent from her now between three and four years, without communicating with her, or providing, though of sufficient ability, any thing for her support, nor does she know where he is, except that he has gone to Europe. In the meantime, deserted as she was, she was obliged to return to her father's house in Little Compton, where, during this time, supported by him or by her own exertions, she has resided, with the exception of about three months passed by her in Newport, Rhode Island. For this desertion and



neglect to provide for her, the proof, *ex parte* it is true, but coming from respectable sources, finds no excuse in her conduct, which, according to it, has always, so far as known, been that of a dutiful and faithful wife. We reserved this case, the first on the circuit which presented the question before discussed for consideration, it being admitted that the husband of the petitioner had never resided with her in this state, or even, as the proof showed, been within its borders, and was now abroad in parts unknown, and was not, of course, personally served, because under such circumstances he could not be personally served with the ordinary citation issued by us to a resident defendant to such a petition. Under the authorized rule of this court, in regard to constructive notice to an absent defendant to a petition for divorce, upon affidavit of the facts, six weeks' notice of the pendency of this petition was given, by publishing the same for the space of six weeks next before the sitting of the court at this term, and it is evident that the husband of this lady knows, as from his conduct it is apparent that he cares, nothing about this proceeding. Whatever was the former domicile of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island, her only home, in the house of her father; and that, as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief, which, under like circumstances, the law and policy of Rhode Island accords to all its citizens. Let a decree be entered divorcing Mary Ann Ditson from George L. Ditson, and annulling the bond of matrimony now subsisting between them; and that the name of the said Mary Ann Ditson be changed to, and she be hereafter known and called by the name of, Mary Ann Simmons, according to the prayer of her petition.

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### FELT v. FELT

59 N. J. EQ. 606. — 1899.

GUMMERE, J. The appellant, by her bill in this case, seeks a decree of divorce from her husband for adultery, and also for desertion. The respondent has pleaded, in bar of the relief sought, a decree of absolute divorce obtained by him against the appellant in a district court of the territory of Utah. A full recital of the averments of the plea is not necessary. It is sufficient for present purposes to say that the truth of those averments is conceded by the appellant; that

from them it appears that the court which rendered the decree pleaded had jurisdiction of the subject-matter of the suit, and of the respondent here, who was the complainant therein and who at the time of the institution of the suit was a *bona fide* resident of the territory of Utah; that the domicile of his wife was in this state, and that she was neither served with process within the territory of Utah, nor did she personally submit herself to the jurisdiction of the court, but that jurisdiction was obtained by publication of the process and complaint made in accordance with the statutes of Utah; that, in addition, personal service thereof was made upon her, at her residence in New Jersey, a sufficiently long time before the period within which to make answer had expired, to afford her an opportunity to defend the suit, if she had desired to do so; and that the decree was granted upon two grounds, viz., cruelty and desertion. What force and effect will be attributed to a decree of divorce, rendered in a court of a sister state, where the jurisdiction of the court rests solely upon the domicile of the complainant, and where the defendant, being a non-resident, is brought into court by publication and the service of notice outside the jurisdiction, is a question of first impression in this court. It will not be denied that the preservation of good morals, and a proper regard for social relations, make it desirable that such a decree should be considered valid, not only in the state where it is pronounced, but in every other jurisdiction, provided the grounds upon which it is based are recognized in such jurisdiction as justifying the decree. By it the matrimonial relation of the husband and wife is terminated in the state in which it is rendered. Within the boundaries of that state a marriage afterwards contracted by either of the parties with a third person is entirely valid. So, too, sexual relations between the former husband and wife, within that jurisdiction, subsequent to the entry of the decree, are illicit, unless sanctioned by a new marriage. But, if the decree is without extra-territorial force, the entire status of both parties is reversed as soon as they pass beyond the limits of that state. A subsequent marriage to a third person within that state then becomes void, and the relations of the parties to it become adulterous; while sexual relations between the parties to the decree, which are meretricious if indulged in within that state, become matrimonial again when indulged in without its borders. A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous, as they happen to be within the limits of one state or another, is not to be tolerated any further than is plainly required by public policy.

That the public policy of New Jersey does not require that recognition should be refused to a decree of divorce, rendered by a court

of a sister state, because the defendant had her domicile in another state, and was not within the jurisdiction of that court, seems to me plain. State policy, when determined by the legislature, controls the judicial branch of the government; and the legislature of New Jersey, by vesting in our court of chancery sole jurisdiction over the subject of divorce, and then authorizing it to render decrees divorcing, *a vinculo*, resident complainants from nonresident defendants, after obtaining jurisdiction over the latter by publication, and notice served out of the state upon, or mailed to the post-office address of, the latter, has, as it seems to me, declared what our policy in this regard shall be. That it was intended by the legislature that decrees of divorce so rendered should be valid in every jurisdiction, so far as it had the power to make them so, goes without saying; and it cannot be conceived that it was intended that we should refuse to accord to the decrees rendered in the courts of our sister states against nonresident defendants, who have not submitted themselves to the jurisdiction of such courts, the efficacy we claim for our own, when liable to the same objection.

As has been heretofore stated, the question before us has never been determined in this court. It, however, received consideration in *Doughty v. Doughty*, 28 N. J. Eq. 581, although the case was decided upon another ground. In that case BEASLEY, C. J., delivering the opinion of the court, says: "A judgment of divorce, resting even on such a contracted foundation as the domicile of one of the parties alone, bears with it, into other jurisdictions, a title to respect, and in some cases a claim to voluntary adoption. In such instances, I regard the question whether the judgment shall be extraterritorially enforced to be one resting entirely on the consideration that, in a matter of unusual interest of this nature, an obligation rests upon every government to carry into effect, as far as is reasonably practicable, and as may be consistent with its own policy, all foreign judgments. But an appeal of this kind to interstate comity should, I think, never prevail, when the judgment sought to be accredited has been rendered in violation of that fundamental axiom of justice that the parties, before their rights are adjudged, shall have an opportunity of being heard. A judgment of divorce proceeding from a jurisdiction founded on domicile would not contravene essential rules of natural justice, if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant out of the jurisdiction in which a suit is pending may add nothing to the judicial right to take cognizance over the cause, but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction." There is

much contrariety of opinion upon the question in the courts of the various states, but the weight of authority seems to support the view expressed in *Doughty v. Doughty* to this extent, at least: that interstate comity requires that a decree of divorce pronounced by a court of the state in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister state, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided, that a substituted service has been made in accordance with the provisions of the statute of that state, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defense thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce. That view commends itself to us, and we think that, subject to the limitations mentioned, the courts of New Jersey should, as a matter of interstate comity, recognize as valid a decree of divorce rendered by the court of a sister state against a resident of this state who has not been served with process.

In the case before us, the court pronouncing the decree which has been pleaded in bar of the relief sought by the complainant was a court of the domicile of the present defendant. It had jurisdiction of the subject-matter of the suit. There was a substituted service of process upon the defendant therein (the present complainant) by publication, in accordance with the provisions of the Utah statute. Actual notice of the pendency of the suit was given to her in time to have enabled her to make defense thereto, if she had desired to do so. There is not even a suggestion that the decree is tainted by fraud, and one of the grounds upon which it rests, namely, desertion, is recognized by the laws of this state as justifying the dissolution of the marriage relation. The decree appealed from should be affirmed.<sup>1</sup>

MAGIE, C. J., dissenting.<sup>2</sup>

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<sup>1</sup> Accord, with a general review of both sides of the controversy, *Dunham v. Dunham*, 162 Ill. 589.

<sup>2</sup> In the course of his dissenting opinion Chief Justice Magie says: "Beginning with the masterly discussion of the subject by Judge Folger, in *People v. Baker*, 76 N. Y. 73, the Court of Appeals of New York, in many successive cases, have maintained the doctrine I contend for."



PEOPLE *v.* BAKER.

76 N. Y. 78. — 1879.

THE indictment charged, and the evidence on the part of the prosecution tended to show, that in the year 1871 defendant in error was married to one Sallie West, in the state of Ohio, and that in November, 1874, while she was still living, he married one Eunice Nelson, at Auburn, in this state.

The defendant in error offered in evidence an exemplified copy of the record of a judgment in the Court of Common Pleas, of the county of Seneca, state of Ohio, in an action by said Sallie against him for divorce. The record showed proof of service of process on defendant by publication; there was no personal appearance by him. The judgment purported to dissolve the marriage, on the ground of "gross neglect of duty," on his part. The statute of the state of Ohio was also offered in evidence, by which it appeared that the proceedings in said action were regular and sufficient, and that the judgment was valid and binding under the laws of that state. Said evidence was objected to on the part of the people, upon the ground that that court had no jurisdiction over the defendant or the subject-matter. The court held that the evidence was incompetent for any purpose save as showing the intent of the defendant, and received the evidence for that purpose only, to which his counsel duly excepted. The further material facts appear in the opinion.

FOLGER, J. As we look at this case, it presents this question: Can a court, in another state, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state.

We assume, in putting this proposition, that the defendant in error was in the situation therein stated. We think that it may properly be thus assumed. It is true, that the first which is disclosed of the defendant in error, by the error-book, shows him in another state, in the act of marriage with Sallie West, the other party in the judicial proceedings there held. It does not appear where his domicile then was, nor where it had been. After the marriage, however, the persons then married resided at Rochester, in this state, at a time prior to the commencement of those judicial proceedings, and he continued to reside in that city until in 1875, and after the final judgment therein was rendered. We look in vain in the error-book

for any exception, proposition or suggestion which presents or indicates that the case was tried at the sessions, upon the theory or contention that the defendant in error was domiciled in Ohio, or temporarily abiding there, at any time during the pendency of the judicial proceedings in that state.

We come back then to the question we have above stated. We are ready to say, that as the law of this state has been declared by its courts, that question must be answered in the negative. The principle declared in the opinions has been uniform. Such is the utterance in *Borden v. Fitch*, 15 J. R. 121; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 id. 30. Nor does it avail against them to say, that the facts of those cases do not quadrate exactly with those of the case before us. The utterances, which we speak of were not inconsiderate expressions, nor *dicta* merely. They were considerate steps in the reasoning, leading to the solemn conclusion of the court. And as touching the question in its general relations, we may cite *Kilburn v. Woodworth*, 5 J. R. 37; *Shumway v. Stillman* 4 Cow. 292; s. c., 6 Wend. 447; and *Ferguson v. Crawford*, 70 N. Y. 253, where the whole subject is elaborately considered. We know of no case in our courts which has questioned the principle declared in these authorities. *Kinnier v. Kinnier*, 45 N. Y. 535 — sometimes claimed to be a departure — does not. It is recognized there that to make valid in this state a judgment of divorce rendered by a court of another state, that court must have “the parties within its jurisdiction,” must “have jurisdiction of the subject-matter and of the parties,” who “must be within the jurisdiction of the court.” *Hunt v. Hunt*, 72 N. Y. 217, does not. That case was close. It went upon the ground, built up with elaboration, that both parties to the judgment were domiciled in Louisiana when the judicial proceedings were there begun and continued and the judgment was rendered, and were subject to its laws, including those for the substituted service of process. We meant to keep the reach of our judgment within the bounds fixed by the facts in that case.

We must and will abide by the law of this state, as thus declared, unless the adjudications in which it has been set forth have been authoritatively overruled in that regard. As this is a question of Federal cognizance, we ought to enquire whether the national judiciary has declared anything inconsistent therewith. *Cheever v. Wilson*, 9 Wall. 108, is cited. Clearly that case is not applicable. There both of the parties to the judgment made a voluntary appearance, and the divorce court had jurisdiction of their persons, as it had of the subject-matter. “It had jurisdiction of the parties, and

the subject-matter," says the opinion in the case cited. It had jurisdiction of the plaintiff in the divorce proceedings, by her voluntary appearance in court, as a petitioner, and showing a *bona fide* residence in that state, in the way fixed therefor by its statute law. It had jurisdiction of the person of the defendant, by his voluntary appearance in the court, and putting in a sworn answer to the petition. The *dictum* in the case of *Pennoyer v. Neff*, 95 U. S. 714, even had it the force of a judgment, does not go to the extent needed to overrule these decisions in our state. It is there held, that to warrant a judgment *in personam*, there must be personal service of process, or assent in advance to a service otherwise. It is also said that a state may authorize judicial proceedings to determine the *status* of one of its own citizens towards a nonresident, which will be binding within the state, though had without personal service of process or appearance. It is not said, much less is it authoritatively decided, that a judgment thus got may do more than establish the *status* of the parties to it, within the state in which the judgment is rendered. The case just cited is the latest annunciation known to us of the Supreme Court of the United States. It does not overrule the declarations of our own courts. It rather sustains them. We must and do concede, that a state may adjudge the *status* of its citizen towards a nonresident; and may authorize to that end such judicial proceedings as it sees fit; and that other states must acquiesce, so long as the operation of the judgment is kept within its own confines. But that judgment cannot push its effect over the borders of another state, to the subversion of its laws and the defeat of its policy; nor seek across its bounds the person of one of its citizens, and fix upon him a *status*, against his will and without his consent, and in hostility to the laws of the sovereignty of his allegiance.

It is said that a judicial proceeding to touch the matrimonial relation of a citizen of a state, whether the other party to that relation is or is not also a citizen, is a proceeding *in rem*, or as it is more gingerly put, *quasi in rem*. But it was never heard that the courts of one state can affect in another state the *rem* there, not subjected to their process, and over the person of the owner of which no jurisdiction has been got. Now, if the matrimonial relation of the one party is the *res* in one state, is not the matrimonial relation of the other party a *res* in another state? Take the case of a trust, the subject of which is lands in several states, the trustees all living in one state. Doubtless the courts of a state in which the trustees did not live and never went, but in which were some of the trust lands, could proceed *in rem* and render a judgment without personal service of process, which would determine there the invalidity of the trust

and affect the possession and title of the lands within the jurisdiction of those courts; but it would not be contended that the judgment would operate upon the trustees or upon the trust lands, in other states, so as to affect the title, or the possession, in those states. It could operate only on the *res* upon which the process of those courts could lay hold. And why is not the matrimonial relation of a citizen of New York, as it exists in that state, if it is a *res*, as much exempt from the effect of such a judgment as lands in that state, and the trust under which they may be held? Is not any other relation of mankind as much a *res* for the touch and adjudication of courts as that of a husband and wife? Take the relation of a minor orphan to its guardian, or to those entitled by law to be its guardians. That is a *status*, in kind as the matrimonial relation. The courts of one state may act and appoint a guardian for such a child, if it is within their territorial jurisdiction, and remains there; but the appointment is not operative *per se* in another state, into which the child goes. (*Woodworth v. Spring*, 4 Allen, 321.) It is, of course, to be granted, as before said, as a general proposition, to which it is not now needful to suggest limitations, that each state may declare and adjudge the *status* of its own citizens. And, hence, if one party to a proceeding is domiciled in a state, the *status* of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that state. But has not the state in which the other party named in the proceeding is domiciled, also the equal right to determine his *status*, as thus affected, and to declare by law what may change it, and what shall not change it? If one state may have its policy and enforce it, on the subject of marriage and divorce, another may. And which shall have its policy prevail within its own borders, or shall yield to that of another, is not to be determined by the facility of the judicial proceedings of either, or the greater speed in appealing to them. That there is great diversity in policy is very notable. It does not, however, seem to tend to a state of harmonious and reliable uniformity, to set up the rule that the state in which the courts first act shall extend its laws and policy beyond its borders, and bind or loose the citizens of other sovereignties. It will prove awkward, and worse than that, afflictive and demoralizing, for a man to be a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another. Yet it is only in degree that it is harder than the results of other conflicts in laws. It is more sharply presented to us, because tenderer, more sacred, more lasting relations, of greater consequence, are involved, and because the occasions calling attention to the conflict have, of late years, become so



frequent. Whatever we may hold in the United States, it will not change results in foreign countries. And in seeking for a rule which shall be of itself, from its own reason, correct, we ought to find or form one, if may be, that is generally applicable. However submissively we must concede to every sovereignty the right to maintain such degree of strictness in the domestic relations as it sees fit within its own territory, there is no principle of comity which demands that another sovereignty shall permit the *status* of its citizens to be affected thereby, when contrary to its own public policy, or its standard of public morals.

We are not, therefore, satisfied with the doctrine that rests the validity of such judicial proceedings upon the right and sovereign power of a state to determine the *status* of its own citizens, and because it may not otherwise effectually establish it, asserts the power to adjudge upon important rights, without hearing the party to be affected, and without giving him the notice which is required by the principles of natural justice, he being all the while beyond its jurisdiction.

Besides, a just consideration of what is a proceeding *in rem*, and of the effect of a judgment therein, shows that the latter does not reach so far as is contended for it. It is a proceeding *in rem* merely. The judgment therein is not usually a ground of action *in personam* in another jurisdiction, for, as a proceeding *in personam*, or as giving foundation for one, the court gets no jurisdiction. (*Pauling v. Bird's Exrs.*, 13 J. R. 192.) How then, upon such basis, can the judgment be brought here and made the foundation of an action against one personally, and if not a means of offense *in personam*, how a means of defence to the person, when sought to be held for personal acts, in violation of the laws of his allegiance?

The consequences of such want of harmony in polity and proceeding, we have adverted to. The extent of them ought to bring in some legislative remedy. It is not for the courts to disregard general and essential principles, so as to give palliation. Indeed, it is better, by an adherence to the policy and law of our own jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict.

It is urged upon us that our state cannot with good grace hold invalid this judgment of a court of Ohio, when our own Code provided, at the time of the rendition of it, for the giving of judgment of divorce against a nonresident, by like substituted service. It is true that, until the new Code of Procedure, such had been the case. (2 R. L. 197, sec. 1; 1 Id. 43), sec. 9; 2 R. S. 144, sec. 38; Id. 185, Id. 187, sec. 134; Laws of 1862, chap. 246, sec. 1; Old Code, sec. 135;

but see New Code, sub. 438, sec. 4.) This is but to say that, on the principle of the comity of states, we should give effect to this judgment. But this principle is not applied when the laws and judicial acts of another state are contrary to our own public policy, or to abstract justice or pure morals. The policy of this state always has been that there may of right be but one sufficient cause for a divorce *a vinculo*; and that policy has been upheld, with strenuous effort, against persistent struggles of individuals to vitiate and change it. And though it is lightly, we must think, sometimes said that it is but a technicality, that there must be personal notice and chance to be heard, to make a valid judgment affecting personal rights and conditions, we cannot but estimate the principle as of too fundamental and of too grave importance not to be shielded by the judiciary, as often as it is in peril.

We are aware that there are decisions of the courts of sister states to the contrary of the authorities in this state. They are ably expressed; they are honestly conceived. They are, however, on one side of a judicial controversy the dividing line whereof is well marked, and is not lately drawn. It would not be profitable to review and discuss them. They are prevalent within the jurisdictions in which they have been uttered, and we cannot expect to change them there. They are in opposition to the judgments of our own courts, which we must respect, and with which our reason accords. It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative, without the territorial jurisdiction of the tribunal giving it.

There is an exception still to be noticed. The court, in charging the jury, stated to them that if the divorce had been obtained under the laws of this state, though the defendant in error would not have been guilty of the crime of bigamy, yet he would have been guilty of a misdemeanor, and that that was a pertinent consideration for them. We do not understand that this was meant for an instruction that they could convict him of the misdemeanor, if they did not find that he was guilty of the higher offence. The charge is to be taken in connection with the reception in evidence of the Ohio record, on the question of his intent. As bearing merely upon his guilty or innocent purpose, it was not inappropriate for the jury to consider that, though a man from whom his wife has been divorced *a vinculo*, in this state may not, by marrying again, incur the penalties for bigamy, he does violate the decree which forbids to him another marriage, so long as she lives.

We are of the opinion that the judgment of the General Term should be reversed, and that of the Sessions be affirmed.

All concur, except CHURCH, Ch. J., dissenting. Judgment accordingly.<sup>1</sup>

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IN RE ELLIS'S ESTATE.

55 MINN. 401.—1893.

GILFILLAN, C. J. Appeal from an order appointing an administratrix. Stating the history of the matters involved in chronological order, in 1869 Matthew Ellis and Rachel Cottrell, then residents in Wisconsin, intermarried in that state, and resided therein — the latter part of the time at Hudson — from the time of their marriage till October, 1883, when they came to St. Paul, Minnesota. February 29, 1884, she commenced, by proper personal service of summons, an action against him for divorce in the Circuit Court for the county of St. Croix (in which Hudson is situated), in said State. Her complaint was sworn to by her, and it alleged, among other things, that she then was, and for more than three years last past had been, a resident of said county and state, and that for more than a year prior to bringing the action the defendant had willfully deserted and refused to live and cohabit with her; and it demanded judgment dissolving the marriage, and requiring the defendant to pay her the sum of \$8,000 alimony. The defendant filed an answer not raising any substantial issues, and the parties made and filed a stipulation agreeing upon the alimony at \$6,150 and a horse, carriage, robes, etc., and all the defendant's household goods, except his library. The answer and stipulation suggest an agreement between the parties for a divorce — a suggestion which ought to have caused the court, and we must assume that it did, to require strict and ample proofs of the facts showing a cause of action, and which would have been influential upon an application to vacate the judgment rendered on the ground of collusion and fraud upon the court. But that did not go to the jurisdiction of the court over the case. A reason for deciding against the plaintiff, or a fraud upon the court as to the judgment to be rendered, or the character of the motive that induced the bringing the action, does not affect the jurisdiction. March 27, 1884, judgment in that action was rendered, dissolving the marriage between the parties, and allowing the plaintiff therein the alimony stipulated; and that alimony was paid. September 2, 1886, Matthew

<sup>1</sup> Further, upon the attitude of the New York courts toward foreign divorces, see particularly *In re Kimball*, 155 N. Y. 62; *Atherton v. Atherton*, 155 N. Y. 129 (reversed in 181 U. S. 155); *McGown v. McGown*, 19 App. Div. 368 (affirmed on opinion below, 164 N. Y. 558); *Hamilton v. Hamilton*, 26 Misc. 336; and *Hammond v. Hammond*, 103 App. Div. 437.

Ellis and Flora Wilson intermarried, and they lived together as husband and wife until December 7, 1892, when he died in St. Paul, Ramsey county, in this state.

Flora Ellis, the second wife, filed a petition in the Probate Court of said county, stating the necessary jurisdictional facts, alleging that Matthew Ellis died intestate, and that she was his widow, and asking to be appointed his administratrix. On the day appointed for the hearing Rachel Ellis appeared, denied that Flora was the widow, alleging that she was the widow, and asked that she be appointed administratrix. At the same time appeared a brother and sister of the deceased, representing that the deceased had made a will, still in force, and asking the court to make the proper order or decree in the premises. The Probate Court appointed Flora administratrix, and on an appeal to the District Court, in which the court heard all the parties, that court affirmed the decision of the Probate Court.

\* \* \* \* \*

The principal question in the case was presented by the appellant's offer to prove, and the ruling of the court excluding the evidence, that at the time of bringing the action in Wisconsin and of the divorce decree neither of the parties to it was a resident of that state, but that both were residents of this state. It is claimed for the evidence that, if admitted, it would have shown that the Wisconsin court had no jurisdiction of the subject-matter of the action, to wit, the marital relation between the parties; that, consequently, the decree was void; Rachel remained the wife, and is now the widow, of Matthew; and that the marriage with Flora was void.

The question thus raised is of great importance, and difficult to satisfactorily determine. It is an undisputable general proposition that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual, *bona fide* domicile within its territory. This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens or subjects without interference of foreign tribunals in a matter with which they have no concern. But when in the court of a state an action for divorce is brought and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction, among them the residence of the parties.

When, as between whom, and to what extent is such determination binding in the state in which the parties are in fact residents? The cases in which the question may arise may be divided into three classes:



First, in proceedings between the state of the parties' actual residence and one of the parties;

Second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it;

Third, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended.

In the second class of cases it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it; the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment.

Of the decisions in cases coming under the first class we refer to four,—*Hood v. State*, 56 Ind. 263; *Van Fossen v. State*, 37 Ohio St. 317; *People v. Dawell*, 25 Mich. 247; and *State v. Armington*, 25 Minn. 29,—all cases between the state of actual residence and one of the parties. In the first of these the record of the judgment showed that neither of the parties was a resident of Utah, where it was rendered, so that the record impeached itself. It was, of course, held that the judgment was void. In each of the others it was held that, in order to show want of jurisdiction in the court rendering the judgment, it might be shown that neither of the parties resided within the state in which it was rendered, and, that being shown, it was void. In the opinion in each case language is used apparently sustaining the proposition that such would be the rule however the question of the validity of the judgment might arise. In *People v. Dawell*, Mr. Justice Cooley delivered the prevailing opinion, Mr. Chief Justice Christy concurring, and Mr. Justice Campbell dissenting. It was enough for the purpose of that case to decide whether the judgment was valid as against the state of residence. Whether it was valid as between the parties was not before the court; and such was the case in *Hood v. State* and *State v. Armington*. So far as the state of residence is concerned, it must be taken upon the authorities, and certainly in this state, upon the *Armington Case*, that it is not bound by a judgment divorcing two of its resident citizens, rendered by a court of another state. There are reasons why it should not be bound, however it may be between the parties, which we will presently refer to.

It does not follow that the judgment is void in the third class of cases. A judgment operating on a *res* may be binding between the

parties to the action without binding one not a party, but interested in the *res*. In an action for divorce the *res* upon which the judgment operates is the status of the parties. There are three different parties interested in that, — the husband, the wife, and the state of their residence. This was in the mind of Mr. Justice Cooley in writing the opinion in the *Dawell Case*. He said: "But it is said if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively." "As the laws now are, there are three parties to every divorce proceeding, — the husband, the wife, and the state; the first two are parties representing their respective interests as individuals; the state, concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion." "Such being the case, suppose we admit that the parties may be bound by their voluntary appearance in the foreign jurisdiction. How does that affect the present case? How, and in what manner, did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the state of Michigan?" This line of reasoning was applied by the same court in *Waldo v. Waldo*, 52 Mich. 94 (17 N. W. 710). One question in that case was whether the plaintiff was the widow of Jerome B. Waldo, just as in this it is whether Flora Ellis is the widow of Matthew. Previous to her marriage to Jerome B. she had been married to one Carey, from whom she had obtained a divorce in Indiana, both parties appearing in the action for it. The court held the judgment could not be assailed by showing want of residence in Indiana and residence in Michigan, saying in one part of the opinion: "This state has never complained of that judgment, and neither party has objected to it." The *Dawell Case* was not referred to, and we may, from both cases, take the rule in that state to be that, while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce, the parties may so bind themselves in respect to their individual interests. In *Kinnier v. Kinnier*, 45 N. Y. 535, a private action, it was held that a judgment of divorce by the court of another state, both parties appearing in the action, could not be assailed on the question of residence. In the course of the opinion, the court, Church, C. J., said: "Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits;" thus

recognizing the effect of the voluntary submission upon the parties' right to question the judgment. Cases in Massachusetts, to which we are cited by appellants, are hardly of authority on the point, because the decisions were based mainly on a statute of that state. *Ellis v. White*, 61 Iowa, 644, (17 N. W. 28), has only bearing on one phase of this case. It was there held that a plaintiff in an action for divorce and alimony cannot question the jurisdiction of the court after accepting the benefits of the judgment.

It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: "It is true that by false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." Because we do not think it can be done, the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them, or either of them, which is the case with the appellants other than Rachel.

There were other minor questions raised by the assignments of error, but we do not see any merit in any of them.

Order affirmed.

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### STARBUCK *v.* STARBUCK.

173 N. Y. 503. — 1903.

HAIGHT, J. This action was brought by the plaintiff as the widow of William H. Starbuck, deceased, to recover dower in the real estate of which he died seised. The decedent and the plaintiff were married in the commonwealth of Massachusetts on the 14th day of October, 1857, he being a resident of this state, where he continued to reside until his death, which occurred on the 29th day of March, 1896. In the year 1868 the plaintiff left her husband's residence and returned to her parents' home in Massachusetts, taking her

daughter with her, where she resided until after his death. She then removed to this state and brought this action. Upon the trial the defendants offered in evidence an exemplified record of a decree of divorce obtained by the plaintiff from her husband in the state of Massachusetts on the 4th day of May, 1874, upon the ground of extreme cruelty. The papers in that action were served upon the decedent personally in this state, but he did not appear in the action either personally or by attorney, and did not submit himself to the jurisdiction of the Massachusetts court. This decree was excluded from evidence upon the objection of the plaintiff's attorney, and exceptions were taken to such exclusion by the defendants. After the divorce Starbuck contracted a marriage with the defendant, Matilda Eliza Starbuck, in the state of Pennsylvania, and the minor defendants are children of that union. The real estate in which the plaintiff seeks to recover dower is all situated in this state, and was acquired by Starbuck after the divorce.

We are of the opinion that the Massachusetts decree was competent, and that the defendants had the right to have it received in evidence. True, the plaintiff could not avail herself of a void decree, which she had procured to be entered, any more than she could of her own declarations, but it is different with the defendants. They have the right to avail themselves of the declarations, acts, and decrees obtained by their opponent, and the principle is well established that, where a party has procured a judgment or decree to be entered, submitting himself to the jurisdiction of the court, he cannot thereafter be heard to question the jurisdiction of the court which entered the judgment or decree. The decree, therefore, if it had been received in evidence, would have operated to defeat her claim that she is now the widow of the decedent and entitled to dower in the real estate acquired by him after the decree. We have recently had under consideration a similar question in *Matter of Swales*, 60 App. Div. 599, 70 N. Y. Supp. 220, affirmed upon the opinion of the Appellate Division, 172 N. Y. 651, 65 N. E. 1122. In that case Mary E. Swales petitioned the Surrogate's Court for letters of administration upon the estate of William H. Swales, deceased, claiming to be his widow. It appeared that they were married on the 3d day of May, 1869, at Sodus, in this state, and that in December, 1873, they separated; that in the year 1883 the petitioner obtained a decree of divorce from him in the state of Illinois, which purported to dissolve the marriage between the parties upon grounds which are not recognized by the laws of this state as sufficient for that purpose. The summons or process by which the action was commenced was served by publication only, and the decedent did not appear in the action either in person or by counsel.



After obtaining the divorce, the petitioner married one David Trobridge, with whom she has since cohabited and resided in this state, and by whom she has a daughter. After the death of Swales she petitioned for letters of administration, as we have seen, claiming to be his widow. In that case ADAMS, P. J., in delivering the opinion of the court, says: "We think the case justifies the application of a \* \* \* principle which is that, where a party has invoked the jurisdiction of any court and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction."

In *Matter of Morrisson*, 52 Hun, 102, 5 N. Y. Supp. 90, the decedent's personal estate was claimed by the legal representatives of her deceased husband, Henry Feyh. He had previously obtained a divorce from her in the state of Ohio while she was domiciled in this state. It was claimed on behalf of the personal representatives of Henry Feyh that the decree of the Ohio court was void in this state. It was held that they were not entitled to the estate. VAN BRUNT, P. J., in delivering the opinion of the court, said: "Henry Feyh, having invoked the jurisdiction of the court of Ohio and submitted himself thereto, cannot now be heard to question such jurisdiction. And the claimants here occupy precisely the same position that Feyh would have occupied had he been living. This position does not rest upon the doctrine of estoppel, as such term is ordinarily used, but upon a principle which has been repeatedly recognized by the courts, that where a party has gone into a court and invoked its jurisdiction, he cannot subsequently attack the decree of the court obtained at his instance because of the want of jurisdiction of somebody else." This decision was affirmed in this court. 117 N. Y. 638, 22 N. E. 1130. See also *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Coddington v. Coddington*, 10 Abb. Prac. 450; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180; *Hewitt v. Northrup*, 75 N. Y. 506; *Matter of Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514; *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28; and *Van Koughnet v. Dennie*, 68 Hun, 179, 22 N. Y. Supp. 823.

There are a number of cases in which the courts of this state have refused to recognize the validity of divorces obtained in other states, upon grounds insufficient for that purpose in this state, when the defendant resided here and was not personally served with process and did not appear in the action. *Matter of Kimball*, 155 N. Y. 62, 49 N. E. 331; *Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; *Cross v. Cross*, 108 N. Y. 628; 15 N. E. 333; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110. But

in none of these cases did the party procuring the decree seek a benefit by having it held invalid. A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor.

We think the case under consideration cannot be distinguished from that of *Swales* or *Morrisson*. It is true that in the *Swales* case the petitioner was seeking administration instead of dower, but if she was the widow of the decedent she had a statutory right to administer the estate, and the plaintiff in her action for dower has no greater right. In the *Swales* case the petitioner, after procuring her decree of divorce, had remarried. In this case the plaintiff procured her divorce but did not remarry; but it does not appear to us that this distinction affects the legal proposition involved.

It is said in the *Swales* case that the action of the plaintiff in procuring the decree of divorce in Illinois does not constitute an estoppel within the ordinary acceptation of that term, for the reason that it did not influence the decedent to do anything which he would not otherwise have done. That may be true in that case, and yet in other cases the decree may influence parties to do that which they otherwise would not have done. The statute of the state of Massachusetts, upon certain conditions, permits both parties to marry again. If Starbuck had gone to that state and had contracted a marriage with a woman there, who acted upon the faith of the decree that the plaintiff had obtained, it may be that a question of estoppel would have been presented. *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408. But we do not deem it necessary to determine that question at this time. We prefer to rest our decision upon the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts court and submitted herself thereto, cannot now be heard to question the validity of its decree.

The judgment of the Appellate Division and that of the trial court should be reversed, and the plaintiff's complaint dismissed with costs

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### *Adultery.*

#### MOORS *v.* MOORS.

121 MASS. 232.—1876.

**LIBEL** for divorce from the bonds of matrimony for desertion. Hearing before Gray, C. J., who reserved the case for the consideration of the full court as follows:

At September term, 1874, the libel was filed, and notice ordered

by publication, returnable to April Term, 1875, when a decree of divorce *nisi* was granted, to be made absolute on notice after six months' publication, "upon compliance with the terms thereof, unless sufficient cause to the contrary appear." At the hearing upon the motion to make the decree absolute, it appeared that its terms had been complied with; but that in June, 1875, the decree not having been made absolute, and the libelee being still alive, the libellant, believing that he had obtained a divorce and was at liberty to marry again, married another woman, and that she was now pregnant by him. Such order or decree is to be made as law and justice may require.

AMES, J. The decree *nisi* heretofore entered in this case was, as the term imports, provisional only, and did not have the effect of dissolving the marriage between the parties. The libellant was not entitled to a full divorce until he had proved that he had given the notice required by the rule of the court under the Stat. of 1867, c. 222, and that no cause to the contrary had been made to appear. Until that is done, and the conditional decree of divorce is made absolute, the marriage relation between the parties continues to subsist. Of course the subsequent marriage, which the libellant has undertaken to contract with another woman, is illegal and void. *Graves v. Graves*, 108 Mass. 314, 320; *Edgerly v. Edgerly*, 112 Mass. 53.

It is urged that as the libellant acted under the belief that he had obtained a divorce and was at liberty to marry again, his intercourse with the woman whom he had since married was not adulterous. But we do not find, in the facts reported, anything to justify him in such an assumption. The terms of the notice which he was required to give imply the possibility that some cause might be shown why the divorce should not be made absolute. If he acted in good faith and under an honest mistake as to his rights and duties, that fact might properly be considered in mitigation of punishment if he should be indicted for adultery, but would be of no avail as a ground of defence. *Commonwealth v. Thompson*, 11 Allen, 23. It hardly need be added that this second marriage furnishes sufficient cause why the conditional divorce should not be made absolute. We can not agree with the counsel for the libellant, that the illegality is merely technical. *Clapp v. Clapp*, 97 Mass. 531.

Libel dismissed.<sup>1</sup>

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<sup>1</sup> Accord in N. Y., under a similar statutory provision deferring the final decree (Code Civ. Pro. § 1774), *Petit v. Petit*, 45 Misc. 155 (Special Term).

As to sufficiency of proof of adultery, see *Aitchison v. Aitchison*, 99 Ia. 93.

*Cruelty.*ROBINSON *v.* ROBINSON.

66 N. H. 600.—1891.

**LIBEL** for divorce. The alleged cruelty was the behavior of plaintiff's wife in adopting the doctrines and professional practice of Christian Science. She was ridiculed, his business suffered, and he became moody, morose and was troubled with insomnia, owing to this domestic trouble. He used every effort to get her to desist from practice of the profession, even though she might retain her belief in its doctrines, but she persistently refused. The health of the plaintiff was seriously injured by the consequences of the conduct of this wife.

**CARPENTER, J.** The act of February 17, 1791, declared that "divorces may be decreed for the cause of extreme cruelty in either of the parties." Laws (ed. 1830) 157. What constitutes extreme cruelty was left to be determined by the ecclesiastical common law. "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties — for it may exist on the one side as well as on the other — the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. If it be complained that by this inactivity of the courts much injustice may be suffered and much misery produced, the answer is, that courts of justice do not pretend to furnish cures for all the miseries of human life; they redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

"Still less is it cruelty when it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the *quantum* of injury done and felt; and, therefore, though the court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot consti-



tute cruelty where it would not otherwise have existed. \* \* \*

The rule cited by Dr. Bever, from Clarke and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been mentioned; the court has never been driven off this ground; it has been always jealous of the inconvenience of departing from it; and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait till the hurt is actually done; but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, — by calling in the succors of religion and the consolations of friends; but the aid of courts is not to be resorted to in such cases with any effect." *Evans v. Evans*, 1 Hagg. Con. 35, 38-40 (decided in 1790). "There must be something which renders cohabitation unsafe; for there may be much unhappiness from unkind treatment and from violent and abusive language; — but the court will not interfere — it must leave parties to the correction of their own judgment; they must bear as well as they can the consequences of their own choice. Words of menace are different; if they are likely to be carried into effect, the court is called on to prevent their being carried on to mischief." *Harris v. Harris*, 2 Ph. Ecc. 111 (1813). "To amount to cruelty, there must be personal violence or manifest danger of it; for unkindness, reproachful language on the one side, or vain and unfounded fear on the other, do not constitute any case of cruelty which the law can notice." *Barlee v. Barlee*, 1 Add. Ecc. 301, 305 (1822). "Legal cruelty is not established. Quarrels, and, if implicit credit can be given to the witnesses on the libel, much improper language by the husband passed, but there was no conduct to excite in the wife any reasonable apprehension of danger to her person." *Kenrick v. Kenrick*, 4 Hagg. Ecc. 114, 129 (1831). "Where there is a strong conviction in the mind of the court that the personal safety of the wife is in jeopardy, or where even it may see reasonable ground to apprehend such consequence, it is its bounden duty to protect the wife from risk and danger. In these

suits the species of facts most generally adduced are, — first, personal ill treatment, which is of different kinds, such as blows or bodily injury of any kind; secondly, threats of such a description as would reasonably excite in a mind of ordinary firmness a fear of personal injury. For causes less stringent than these the court has no power to interfere and separate husband and wife. \* \* \* Short of personal violence, or reasonable apprehension of it, I have no authority to interfere." *Neeld v. Neeld*, 4 Hagg. Ecc. 263, 265, 271 (1831). To constitute cruelty "there must be either actual violence committed, attended with danger to life, limb, or health; or there must be a reasonable apprehension of such violence. This I apprehend to be the substance of the doctrine laid down in *Evans v. Evans*, \* \* \* and in other subsequent cases." *Lockwood v. Lockwood*, 2 Cur. Ecc. 281, 283 (1839).

In *Chesnutt v. Chesnutt*, 1 Spinks 196 (1854), one of the charges against the defendant was that "he used obscene and blasphemous language, was constantly intoxicated, and thereby occasioned his wife great mental suffering and bodily ill health." The court (Dr. Lushington) say, pp. 188, 191 — "Here is no charge either of bodily violence inflicted, or of threats of personal ill treatment. However disgusting the use of the language charged, if proved, may be — however degrading habits of intoxication — however annoying to a wife, especially the wife of a gentleman and a clergyman, — these facts standing alone do not constitute legal cruelty. If it be said that the consequences to the wife are mental suffering and bodily ill health, I do not think that the case would be carried further. The same might be said of other vices, — of gaming, for instance; of gross extravagance, to the ruin of a wife and family; — all these might occasion great mental suffering, and, consequent thereon, bodily ill health to the wife; but they do not constitute legal cruelty. Such consequences, to be the subject of legal redress, must emanate from bodily ill treatment, or threats of the same. Such I apprehend to be the clear line of distinction drawn by all the authorities. \* \* \* Mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband, do not constitute cruelty, except such conduct was accompanied with violence or threats of violence."

In *Barrere v. Barrere*, 4 Johns. Ch. 187, 189 (1819), Kent, Ch., after reciting the facts, says: "There can be no doubt that these acts of bodily violence and harm amount to that cruelty against which the law intended to relieve. Mere petulance and rudeness and sallies of passion might not be sufficient; but a series of acts of personal violence, or danger of life, limb, or health, have always

been held sufficient ground for a separation by the canon law, which is the law of England upon this subject. Though a personal assault and battery, or a just apprehension of bodily hurt, may be ground for this species of divorce, yet it must be obvious to every man of reflection that much caution and discrimination ought to be used on this subject. The slightest assault or touch in anger would not surely, in ordinary cases, justify such a grave and momentous decision."

"The cruelty which entitles the injured party to a divorce consists in that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe. If the charges in this bill are true; if this defendant permits her passions so far to usurp the throne of reason as to allow her to \* \* \* commit personal violence upon her husband in his sleep, \* \* \* to threaten his destruction by poison and even to go so far as to procure a deadly drug for that purpose, not only his health, but even his life, is in actual danger from her violence." *Perry v. Perry*, 2 Paige, 501-503 (1831). "It is true, that to constitute *sævitia* known to the civil law, \* \* \* it is not necessary there should be an infliction of bodily injury, or any act of personal violence committed. It is sufficient if there be a series of unkind treatment accompanied by words of menace creating a reasonable apprehension that bodily injury may result to the wife unless prevented. \* \* \* It [cruelty] must be actual personal violence, menaces or threats, creating reasonable apprehension of bodily harm." *Mason v. Mason*, 1 Edw. Ch. 278, 291, 292 (1832). The courts of Massachusetts held substantially the same doctrine. *Hill v. Hill*, 2 Mass. 150 (1806); *Warren v. Warren*, 3 Mass. 321 (1807); *French v. French*, 4 Mass. 587 (1808).

The question what constitutes extreme cruelty first came before this court in 1834, in *Harratt v. Harratt*, 7 N. H. 196. The evidence proved that the defendant had threatened to take the plaintiff's life, had treated her harshly and with neglect in sickness, and had ceased to provide for her support; it also tended to show a reasonable apprehension that cohabitation might subject the plaintiff to disease. The court, Parker, J., after citing with approval *Warren v. Warren*, *Evans v. Evans*, and some of the other foregoing cases, say, "That cruelty may be extreme without blows cannot be doubted; and we have no difficulty in holding that where the causes are grave and weighty, and such as to show an impossibility that the duties of the married life can be discharged — when violence is menaced, and there is reasonable apprehension of danger to life, limb, or health — the case comes within our statute, and that the court ought not to

wait until the hurt is actually done. There has been more doubt whether the case before us, on the facts in evidence, comes clearly within the principle. The evidence, however, shows that the life of the libellant has been threatened, and we cannot say that there is no probability that violence will be resorted to; and as there is further evidence of harsh treatment and neglect, and of circumstances tending to show that cohabitation would be attended with danger to the health of the libellant, the court is of opinion that all these circumstances combined bring the case within the statute." In *Poor v. Poor*, 8 N. H. 307, 315, 316, decided in 1836, Richardson, C. J., says: "What, then, is extreme cruelty? It is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, or even occasional sallies of temper, if there be no threat of bodily harm. \* \* \* In the judgment of law, any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship and renders cohabitation unsafe, is extreme cruelty. And in order to amount to such cruelty it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have been once wantonly and without provocation used, the wife can hardly be considered safe."

To constitute extreme cruelty, direct bodily injury, actual or threatened, was essential. Threats of personal violence, unless of such a character as to create "in a mind of ordinary firmness" a reasonable apprehension that they might be executed, were not legal cruelty. To the exceptionally sensitive and timid wife, put in actual and constant fear of limb or life by conduct not calculated to have that effect on a person of normal and ordinary sensibility, the law of divorce afforded no relief. The infliction of mere mental pain, however seriously it might injure health or endanger reason, was not legal cruelty. A husband might violate all the proprieties and decencies of social life; he might call "his virtuous wife a strumpet, saying so not to herself alone, but before everybody," although "as far as suffering was concerned he had better kick her" (*Paterson v. Paterson*, 3 H. L. Ca. 308, 313); he might bring prostitutes into his family and seat them at his table,—make his house a brothel,—and the law, if it would justify the wife in leaving him, afforded her no other remedy. For such conduct as that described in *W—— v. W——*, 141 Mass. 495, and the injury caused to "her health by its effect upon her feelings," the wife was then, in New Hampshire, as she is now in Massachusetts, remediless. Constant, innumerable, and nameless indignities of speech and action, each possibly petty in itself, might cause mental anguish less endur-



able, more hurtful to physical well-being, and more likely to overturn reason, than any degree of pain produced by blows; they might make life intolerable and death welcome, yet they were not legal cruelty. The sufferer's only remedy was "by prudent resistance," and "by calling in the succours of religion and the consolations of friends."

In consideration of this state of the law, the legislature, in 1840, enacted that "divorces \* \* \* shall be decreed in favor of the innocent party \* \* \* when either party shall so treat the other as seriously to injure health or endanger reason." Laws 1840, c. 573, sec. 1. This provision in substantially the same language has ever since remained in force. Rev. Stats. c. 148, sec. 3. In the revision of 1867 it was verbally modified to read as follows: a divorce \* \* \* shall be decreed \* \* \* V. When either party has so treated the other as seriously to injure health. VI. When either party has so treated the other as seriously to endanger reason. Gen. Stats. c. 163, sec. 3; G. L. c. 182, sec. 3. The provision is to be construed in view of the mischief it sought to cure. It was intended to provide for a divorce of the parties in cases of the character referred to, where the conduct complained of did not fall within the established definition of extreme cruelty. It gave by legislation the relief which the English courts, pressed by the weight of the same considerations, have gone far to afford (*Paterson v. Paterson*, 3 H. L. Ca. 308, 318, 319, 325-329 [1849]; *Kelly v. Kelly*, L. R. 2 P. & D. 31 [1869]; *Mytton v. Mytton*, 11 P. D. 141 [1886], and Bish. Mar. & Div. [4th ed.], sec. 722, n), and which the courts of some jurisdictions under like pressure have afforded by a more liberal interpretation of the term "cruelty." *Butler v. Butler*, 1 Par. Eq. Cas. 329; *Powelson v. Powelson*, 22 Cal. 358; *Latham v. Latham*, 30 Grat. 307; *Cole v. Cole*, 23 Iowa, 433; *Gholston v. Gholston*, 31 Ga. 625; *Palmer v. Palmer*, 45 Mich. 150; *Carpenter v. Carpenter*, 30 Kan. 712; *McMahan v. McMahan*, 9 Or. 525; *Kelly v. Kelly*, 18 Nev. 49; *Jones v. Jones*, 60 Tex. 460.

Whether one party has been so treated by the other as seriously to injure health or endanger reason is a pure question of fact. It cannot be declared as matter of law that any particular treatment may not have that effect. The gist of these causes of divorce is the injury to health and the danger to reason. Conduct which to a serious extent produces either, though not intended to have such a result,—though it be "purely self-regarding," and not "directed towards" or "forced even upon the knowledge of" the other party "otherwise than by the usual intimacy of matrimony" (*W—— v. W——*, 141 Mass. 495, 496),—is a cause of divorce. Any be-

havior of one party which affects the other physically or mentally is treatment within the meaning of the statute. A narrower sense cannot be given to the language used without ignoring the extent of the evil to be cured, and depriving a large proportion of those who suffer from it of the protection, and legislation was to make the remedy coextensive with the mischief. A malevolent motive in the party complained of need not be shown. Divorce is not punishment of the offender, but relief to the sufferer. Whether the behavior proved is a sufficient ground of divorce depends on the question whether it has seriously injured health or endangered reason. This is the sole test. The question, not whether the treatment reasonably ought, or could reasonably be expected, seriously to injure the health or endanger the reason of a person of ordinary intelligence and mental strength, but whether it has, in fact, had that effect upon the health or reason of the person complaining. A course of conduct which would drive one person crazy, might have no effect on, or might even be grateful to, another and perhaps more sensible or less sensitive person; but he or she whose reason is imperilled by it is not, therefore, to be compelled to endure the treatment. That the conduct complained of is in itself innocent, or even laudable, and is pursued from a sense of duty, does not afford a sufficient reason for requiring the party injured by it to submit to the destruction of health, reason, and life. The abstract reasonableness of the treatment, or its effect upon reasonable persons of ordinary firmness, does not enter into the question. If it did, the redress intended by the statute could not in many cases be obtained. The provision was designed for the benefit of the sensitive — not excepting the abnormally sensitive — and not for the insensible and apathetic, whom nothing but blows can affect. It was intended to reach and provide relief in a class of cases where extreme cruelty as defined by law cannot be established — cases, among others, of slow and continuous mental torture, destructive of health or reason, and caused by conduct not necessarily wrongful, possibly even praiseworthy, in itself, and made a cause of divorce only because of its effect upon an abnormally sensitive mind.

The injury, and in greater part the suffering, caused by acts tending to the destruction of health or reason may not depend upon the intention with which they are done. Whether they are done with or without malice, they may be in their effect equally hurtful and destructive. In the judgment of the legislature, it is better that the marital relation be dissolved, than that by its continuance the health or reason of either party be destroyed. Whether the legislation is wise or unwise is a question upon which opinions may differ; but

with it the court has no concern. Its duty is to enforce the law as it is found to be. To hold that to warrant a divorce treatment seriously endangering health or reason must be willful, malicious, or malevolent, would repeal the statute.

It is found that the defendant's conduct has seriously injured the plaintiff's health, and the court cannot say that the finding is not warranted by the evidence. *Fones v. Fones*, 62 N. H. 463, 467.

Divorce granted.

SMITH, J., did not sit; the others concurred.

### *Desertion.*

#### WATSON *v.* WATSON.

28 ATL. REP. 467.

(NEW JERSEY CHANCERY, 1894.)

SUIT by George E. Watson against Mary L. Watson for divorce. On exceptions to master's report, advising that the petition be dismissed. Exceptions overruled, and petition dismissed.

MCGILL, CH. The petitioner and the defendant were married in 1871, and from that time until 1890 lived together as husband and wife. In April, 1890, upon the occasion of a disagreement, at which the husband, as he says, merely scolded her, the wife withdrew from his bed, and declared that she would never occupy it with him again. She thereupon removed to the front or sitting room of the two apartments they occupied in a boarding house, locked the door between the apartments, and made her bedroom there until July, 1892, when she took board at another place. I find that during the time in question, although the communications between the husband and wife were rude and severely constrained, they nevertheless admitted of indirect consultations concerning the needs, comfort, and welfare of their two daughters, who were away at school. The wife also cared for their rooms and linen, and the husband gave her money for her wants, and paid her board. They appeared at meals at the same time, and at the same table, so that their disagreement did not manifest itself to other boarders in the house. The petition was filed early in the year 1893, and alleges, as ground for divorce, a willful, continued and obstinate desertion by the husband for two years. To cover that statutory period, the petitioner seeks to include a portion of the time prior to July, 1892, and hence the question is presented whether the withdrawal of a wife from sex-

ual intercourse with her husband, assuming that there was no just cause for the withdrawal, alone constitutes "desertion," within the meaning of the statute.

A single word as to a suggestion of acquiescence on the part of the petitioner. It does not appear that he, with determined earnestness, ever sought the restoration of his marital rights. He appears rather to have submitted to the position in which his wife's determination placed him, acting as one who, for cause, acquiesces in the justness of a decision against him, basing whatever feeble effort he may have made in that direction upon consideration for their children. Upon her part, on the contrary, the attitude appears to be one of distress, and yet, filled with consciousness of power which the right gives, she fearlessly demands her support from him. I think, however, that this appearance of acquiescence of the husband rests too largely upon inference and conjecture to be made the basis of a decision. I prefer to assume that there was no acquiescence and to meet the question first stated. I have read with interest the elaborate argument of Mr. Bishop, in his work on Marriage, Divorce, and Separation (volume 2, sec. 1676, *et seq.*), in favor of an affirmative answer to this question as the "better opinion," but I am unwilling to accept it as the true construction of our statute. The word "desertion," I think, is used in the sense of "abandon," to the extent that the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her. It would, I think, degrade the marriage relation to hold that it is abandoned when sexual intercourse only ceases. The lawfulness of that intercourse is perhaps a prominent and distinguishing feature of married life, but it is not the sum and all of it. The higher sentiment and duty of unity of life, interest, sympathy, and companionship have an important place in it, and the thousand ministrations to the physical comforts of the twain, by each in his or her sphere, in consideration of the marriage obligation, and without ceaseless thought of pecuniary recompense, fills it up. These latter factors may possibly, to some extent, exist in other relations of life, but not in completeness. They are all necessary to the perfect marriage relation. My opinion is that our statute means that divorce may be had when substantially all of these duties and amenities shall have been abandoned by the guilty party, willfully, continuedly, and obstinately, for two years, and not until then. In other words, the desertion must be complete, not partial; and, when the party accused remains in discharge of any duties which arise in value above mere pretence and form, the desertion which the statute contemplates does not exist. This I understand to be the meaning



accorded to the word "desertion" in the statute of Massachusetts. *Southwick v. Southwick*, 97 Mass. 327; *Magrath v. Magrath*, 103 Mass. 577; *Cowles v. Cowles*, 112 Mass. 298. In the present case, I find that, within two years prior to the filing of the bill, the defendant did remain with her husband, in the discharge of, at least, a substantial portion of her duty to him. I will sustain the master in his conclusion, and dismiss the petition.

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### DANFORTH v. DANFORTH.

88 ME. 120.—1895.

WALTON, J. The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. *Stewart v. Stewart*, 78 Me. 548, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In *Kennedy v. Kennedy*, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that on one occasion he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three successive years," is one of the causes for which a divorce may be granted. R. S. c. 60, sec. 2. And we think that if a wife deserts her husband and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation.

If he succeeds, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion will be interrupted, or regarded as condoned, and cannot be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete — that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded for further hearing in the court below.<sup>1</sup>

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### *Imprisonment.*

#### LEONARD *v.* LEONARD.

151 MASS. 151.—1890.

C. ALLEN, J. The libellant seeks a divorce from her husband on the ground that he has been sentenced to imprisonment at hard labor in the state prison at Waupun, Wisconsin, for a term of seven years and six months; and the question presented to us is whether such a sentence passed in another state is a good cause of divorce here. The Pub. Sts. c. 146, sec. 2, provide that a divorce may be

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<sup>1</sup> "The grounds alleged by the wife are, that without fault on her part, the husband abandoned her for a year before the institution of the action, and that for more than six months he behaved to her habitually in such cruel and inhuman manner as to destroy her peace and happiness, and to indicate a settled aversion to her. The proof sustains neither ground. After living together some eight or ten years at the home of the husband's father in Oldham county, and on his farm, the parties moved to the house of the wife's mother in Shelbyville, where the husband kept a butcher's shop. After living there some two years or more, the mother-in-law ordered the husband away, but allowed the wife to remain, and she, in August, 1890, moved to Louisville to live with her sister. When a year expired she brought this suit. The proof, however, shows that she visited her husband on his farm in Oldham county, in the summer and fall of 1890, spending the night with him. In November also of that year she went with her husband to visit Fox and wife, and they spent the night there together. Here they appeared to be living happily together as husband and wife. They also stayed together at the St. Cloud Hotel, in Louisville, on the night of December 26, 1890. These occurrences were from eight to ten months only before the institution of the action. They evince anything else than an 'abandonment,' such as the statute contemplates." HAZELRIGG, J., in *Woolfolk v. Woolfolk*, 96 Ky. 657, 658.

decreed "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction." The first statute in this commonwealth making a sentence to imprisonment a cause of divorce was the Rev. Sts. c. 76, sec. 5, where the language is substantially the same as that quoted above, except that the term required is seven years or more. Desertion was not made a cause of divorce till afterwards, by the St. of 1838, c. 126, and it is, therefore, apparent that the sentence of imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offence, the nature of which was known to the legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable here at all. The term "the state prison," when used without further description in the Revised Statutes, as well as in the more recent legislation, means the state prison of this commonwealth. *Beard v. Boston*, ante, 96. No instance to the contrary has been cited to us, and we do not now recall any. If a state prison elsewhere was intended, it would be natural to say so in distinct language, as in the Rev. Sts. c. 144, sec. 34. A sentence to imprisonment elsewhere is not included as a cause of divorce, within the meaning of the Pub. Sts. c. 146, sec. 2. *Martin v. Martin*, 47 N. H. 52, 53.

Libel dismissed.<sup>1</sup>

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### *Condonation.*

## ALEXANDRE *v.* ALEXANDRE.

2 PRO. & DIV. (ENG.) 164.—1870.

THIS was a petition by a husband for the dissolution of his marriage on the ground of his wife's adultery with some persons unknown.

It was proved on the hearing of the petition that the parties were married in Jersey on the 26th of January, 1856, that they afterwards cohabited in Jersey for a short time, that they then separated, and that in October, 1860, during the separation, the respondent had given birth to a child of which the petitioner was not the father, that the respondent had been guilty of adultery in London subsequent to the birth of the child, and that in the months of March and April, 1868, subsequent to the date of such adultery, the petitioner and the respondent had resumed cohabitation and had lived together

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<sup>1</sup> See 31 Lawyers' Rep. Ann. for extended note upon the effect, upon the marriage relation, of a conviction and sentence of either the husband or wife.

for a few weeks in lodgings in London. The respondent was examined as a witness on behalf of the Queen's Proctor, and she stated that before she returned to cohabitation in March, 1868, she confessed to the petitioner that she had given birth to an illegitimate child during the separation, and that he received her with a full knowledge of that fact, and allowed the child to live with them in their lodgings. She admitted, however, that she did not disclose to him any other acts of adultery of which she had been guilty during the separation.

#### THE JUDGE ORDINARY.

\* \* \* \* \*

As regards the adultery which resulted in the birth of the child, I think the facts now disclosed are a complete answer to the petitioner's claim for a decree, because he condoned it. But there is another charge of adultery, which was established on the first hearing, and which is not only not refuted now, but is really supported by what the respondent has told us. In the eighth paragraph of his petition he alleges that from the month of September, 1867, till the month of March, 1868, she committed adultery with divers men, on divers occasions. And then he goes on to allege "That she lived as a prostitute at No. 7 Buckingham Place." At the trial he proved that charge by a policeman, who said that he saw this woman take men home to her house at night, on more than one occasion. When she was in the witness box she refused to answer categorically as to all that she did at Buckingham Place; but with very great truth, as it seems to me, she acknowledged that subsequently to the birth of the child she had been guilty of adultery, although she denied that she had led the sort of life imputed to her; and I am the more inclined to believe her in that portion of her denial from the candor with which she admitted the rest of the charge. Then, substantially, the charge of adultery at 7 Buckingham Place is proved, and what answer is there to that adultery? It has never been condoned, because the husband never knew of it. When she went back to live with him, in 1868, she carefully concealed it from him — she was afraid to tell him. She told him of the child, and very possibly one reason of her doing so was that she was very anxious to have the child to live with her. But whether that was her reason or not, she admitted having committed herself once, and having had a child; and she certainly kept back the life she had been leading in Buckingham Place. It seems to me, therefore, that as there was no condonation of the adultery there committed, I ought not to withhold the decree. At the same time, it was a most proper case for the Queen's Proctor to investigate. The court would not have known the real



facts of the case if the Queen's Proctor had not intervened; and the petitioner has only himself to thank for the intervention, because he deliberately inserted in the petition this false statement about the child. Of course I am aware that evidence might possibly have been produced on his behalf which might have contradicted the evidence now before the court on that matter, but it is a collateral matter, and it is unnecessary to investigate it. It is sufficient to say that an adultery has been proved which has never been condoned, and therefore the petitioner is entitled to his decree.

Decree absolute accordingly.<sup>1</sup>

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*Connivance.*

WILSON *v.* WILSON.

154 MASS. 194.—1891.

**LIBEL** by a husband to obtain a divorce on the ground of adultery. Trial in the Superior Court, before Lathrop, J., who found that the libelant was guilty of connivance, and ordered a decree to be entered dismissing the libel, and reported the case for the determination of this court. If the evidence did not warrant the finding, or if, as matter of law, the order was wrong, a new trial was to be granted; otherwise, the decree was to stand. The nature of the evidence appears in the opinion.

The case was submitted on briefs on March 8, 1891, and afterwards, in June following, was resubmitted on the same briefs to all the judges.

**MORTON, J.** This case turns on the question whether the finding of the court was correct, that the libelant was, upon the evidence, guilty of connivance.

The libelant did nothing to encourage his wife to commit adultery, and did not, directly or indirectly, throw opportunities in her way. Until the day he detected her, the report does not show that any unusual or improper acts had occurred in his presence between her and any other man. He had suspected and had watched her, but had not obtained proof of her guilt, and had not, till the day he caught her, had the assistance of a detective or police officer. On that day he came from his home in Dorchester, and waited, suspecting she might come to Boston also, and might leave the Dorchester street car at the corner of Federal street and Beach street in Boston, which she did. She met a man by the name of Andrews, whom

<sup>1</sup> Condonation is upon the implied condition of future conjugal kindness, and a breach of the condition revives the original right of divorce. *Fisher v. Fisher*, 93 Md. 298.

there is nothing to show the libellant had ever seen or heard of before, and went with him to a hotel. The libellant followed her, and after waiting in the hotel an hour, and listening ten or fifteen minutes at the door of the room where they were, burst it open and found them in bed together. He hoped she would commit adultery, so that he could get a divorce, and he gave her plenty of time so that she might do it, and did not warn her. He thought before this that she had committed adultery.

We think, as matter of law, it cannot be said, on this state of facts, that the libellant was guilty of connivance. It is true that he could have prevented his wife from committing adultery, and did not; on the contrary, he wished she would, that he might have evidence on which he could get a divorce. But he did not make, or aid in any way in making, the opportunity. He did no overt act, unless keeping still was one, which it clearly was not. It was not a case where he supposed his wife was about to commit adultery for the first time, and where it would have been his duty to give her the assistance which husband and wife are mutually expected to give to each other. It certainly cannot be held that a husband who suspects his wife of infidelity can take no means to ascertain the truth of his suspicions without being deemed guilty of connivance. "There is a manifest distinction," says the court in *Robbins v. Robbins*, 140 Mass. 528, 531, "between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity."

Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Marriage & Divorce (5th ed.), sec. 9; *Timmings v. Timmings*, 3 Hagg. Ecc. 76; *Stone v. Stone*, 1 Rob. Eccl. 99m, 101; *Phillips v. Phillips*, 10 Jur. 829.

The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect. *Robbins v. Robbins*, 140 Mass. 528, 531. In a libel for divorce for desertion, the willingness, or even the desire, of the deserted party to be deserted, so long as it is not expressed in conduct or acts to the other party, will not bar a divorce. *Ford v. Ford*, 143 Mass. 577. Of course, as the court says in that case, there is always the difficulty of believing that the desire or unwillingness did not manifest itself in conduct or acts expressive of it to the other party. But nothing of the sort appears here.

In *St. Paul v. St. Paul*, L. R. 1 P. & D. 739, the court held that the neglect of the husband which would justify the court in withholding a decree in his favor, under a statute which provided that the court might do so where the husband was guilty of "such willful neglect or misconduct as \* \* \* conduced to the adultery," must be such neglect as conduced to the wife's fall, and not neglect conducing to any particular act of adultery subsequent to her fall.

The case, *Morrison v. Morrison*, 136 Mass. 310, referred to by the libelee, differs from this. In that case the husband, after he had been cautioned to watch his wife, made opportunities for her and her suspected paramour to be together alone, witnessed without objection acts of considerable familiarity between them, said nothing whatever to his wife intimating any disapproval of her conduct, and in other ways acted in such a manner as to induce the adultery for which he was watching.

In the opinion of a majority of the court, there must, therefore, according to the reservation of the report, be a new trial, and it is  
So ordered.

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*Collusion.*

BARNES *v.* BARNES.

L. R. 1 PROB. & DIV. (ENG.) 505.—1868.

THIS was a petition by a husband for a dissolution of marriage. The petitioner was a valet in a gentleman's service, and the respondent had also been in service. At the time when the adultery was charged to have been committed she was lodging in the house of

Grimwade, the co-respondent, who was a baker, the petitioner not living with her, but visiting her from time to time when he could get leave of absence from his service. Neither the respondent, nor the co-respondent appeared, and on the 31st of July, 1866, the petition came on for hearing before the judge ordinary, and a decree *nisi* was pronounced. The Queen's Proctor afterwards intervened, and pleaded: 1, That the petitioner had been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice of the case. 2, That divers material facts respecting the conduct of the petitioner were not brought before the court. 3, That the petitioner connived at the respondent's adultery. 4, That the petitioner was guilty of adultery. The petitioner traversed all the allegations, and the cause was heard by the judge ordinary on the 21st and 22d of November, 1867.

The charge of adultery against the petitioner was abandoned, but evidence was produced in support of the other charges. It was, in substance, that, before the adultery complained of, and while the respondent was residing in the co-respondent's house, the petitioner and the respondent and the co-respondent had been in the habit of going together to places of amusement; that the respondent and the co-respondent frequently danced together at these places in the petitioner's presence; that the petitioner frequently went away late at night, leaving the respondent and the co-respondent together at these places; and that on two occasions a policeman, who was a friend of the petitioner, had spoken to him as to the imprudence of his conduct, when he remarked that the co-respondent was a good fellow, and would do no harm, and took no further notice.

The substance of the evidence as to the collusion was that the petitioner had several interviews with the respondent after he ceased to cohabit with her, and both before and after the suit was instituted, and that at some of these interviews he gave her money; that they had spoken together about the divorce, and he had told her not to take any notice of the suit, for he could get a divorce for £40 if she did not oppose, and he would be a friend to her hereafter, and would give her money when it was all settled, and that he would not hurt a hair of the co-respondent's head, and the expense would not fall on him; that on one occasion, after the petition and citation were served on her, they went together to a public house, and had refreshment, for which he paid, and she asked him what she was to do with the papers she had received, and he told her they were of no consequence, and she could burn them, and that she was to keep quiet.



THE JUDGE ORDINARY [after stating the facts of the case, and referring to the statute under which the Queen's Proctor intervened<sup>1</sup>], said: I am of opinion that, although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery.

With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money, both before and after the institution of the suit, does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance whilst a suit is pending, in order to save the expense of an application to the court for alimony. If that evidence stood alone I should hold that it was not sufficient to prove the charge of collusion, but the evidence goes much further. It amounted, in substance, to this, that the petitioner said to the respondent, "If you don't oppose, I shall get a divorce cheaper than if you do; therefore, keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent." If that is not collusion, I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not, as far as her own adultery is concerned. But if she had brought to the knowledge of the court the facts which have now been proved as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the court would have granted a decree.

For these reasons, I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established. The petition must therefore be dismissed

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### *Recrimination.*

#### PEASE *v.* PEASE.

72 WIS. 136.—1888.

COLE, C. J. The plaintiff and appellant brought this action for a divorce from the bonds of matrimony on the ground of adultery committed by the defendant. The wife denied the charge of adultery in her answer, and by way of recrimination, defence, or bar to

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<sup>1</sup> 23 and 24 Vict. c. 144, sec. 7.

plaintiff's action, asked for a limited divorce from the husband on the ground of cruel and inhuman treatment on his part. On the trial of the issue of adultery the jury found against the defendant; and the court found the plaintiff guilty of cruel and inhuman treatment of the defendant, and held that neither party was entitled to a decree of divorce. The sole question before us on this appeal is the correctness of this decision.

Our statutes make adultery and cruel and inhuman treatment of the wife by the husband equally grounds of divorce. Sec. 2356, R. S. The statute places them upon the same ground, attended by the same legal consequences. The cruelty complained of and proven consisted of acts of personal violence on the part of the husband; his striking her in one instance a severe blow in the face with his fist while she was lying in bed, which blow caused a wound that bled freely, and left a bruise for several days upon the face. The Circuit Court also found other instances proven of violent conduct on the plaintiff's part towards his wife, which in some cases were mitigated to some extent by her improper and exasperating behavior. The evidence is not before us, but we must presume it fully sustained the finding of the court on the facts. So, the simple question presented is, Where it is shown that each party has been guilty of an offence which the statute has made a ground for divorce in favor of the other, will the court interfere and grant relief to either offending party? We do not perceive upon what logical principle the court could grant redress to the husband for the adultery of the wife when he himself has been guilty of an offence which would give her a right to an absolute divorce were she without fault. Both parties have violated the marriage contract, and can the court look with more favor upon the breach of one than the other? It is an unquestioned principle that where one party is shown to have been guilty of adultery such party cannot have a divorce for the adultery committed by the other. *Smith v. Smith*, 19 Wis. 522. Mr. Bishop says there is an entire concurrence of judicial opinion upon that point both in England and in this country, and that it makes no difference which was the earlier offence; nor even that the plaintiff's act followed a separation which took place on the discovery of the adultery of the defendant. 2 Bish. Mar. & Div. sec. 80. In the forum of conscience, adultery by the wife may be regarded as a more heinous violation of social duty than cruelty by the husband. But the statute treats them as of the same nature and same grade of delinquency. It is true, the cruelty of the husband does not justify the adultery of the wife; neither would his own adultery — but still the latter has ever been held a

bar. And where both adultery and cruelty are made equal offences, attended with the same legal consequences, how can the court, in the mutual controversy, discriminate between the two, and give one the preference over the other? It seems to us that, as the law has given the same effect to the one offense as the other, the court should not attempt to distinguish between them, but treat them alike and hold one a bar to the other. The following authorities enforce this view of the law where the divorce law is like our own: *Hull v. Hull*, 4 Allen, 39; *Handy v. Handy*, 124 Mass. 394; *Nagel v. Nagel*, 12 Mo. 53; *Shackett v. Shackett*, 49 Vt. 195; *Conant v. Conant*, 10 Cal. 249; 2 Bish. Mar. & Div. secs. 78-87. See, also, *Adams v. Adams*, 17 N. J. Eq. 325; *Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 489; *Lempriere v. Lempriere*, id. 569. We, therefore, think the circuit was right in holding upon the facts that neither party was entitled to a divorce, because each was guilty of an offence to which the law attached the same legal consequences.

But the plaintiff's counsel contends that under sec. 2360, R. S. which provides that in an action for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce (1) when the offence shall appear to have been committed by the procurement or with the connivance of the plaintiff; (2) where the adultery charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof or by the voluntary cohabitation of the parties with knowledge of the offence; (3) when there shall have been no express forgiveness and voluntary cohabitation of the parties, but the action shall not have been brought within three years after the discovery by the plaintiff of the offence charged. The adultery, he says, was found in this case, but none of the facts set forth in the above three subdivisions were found to exist, therefore the divorce should have been granted. This provision is declaratory of the common law, and gives the trial court discretion to refuse a divorce for adultery where certain things were proven or shown to exist. It might be claimed, in view of the statutory provisions, that the court had no discretion in the matter where the adultery was established, but was absolutely bound to grant the divorce, though there had been connivance of the parties, or condonation, or the injured party had unduly delayed bringing the action after a discovery of the offence. To remove all doubt upon that point the provision was enacted. It was not intended to do away with the general principle that one cannot have redress for a breach of the marriage contract which he has violated by committing a like offence as that of which he complains, but must come

into court with clean hands. This principle still pervades our law, and must be recognized.

From these views it follows that the judgment of the Circuit Court must be affirmed.

By the Court — Judgment affirmed.<sup>1</sup>

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### *Insufficient Evidence.*

#### BILLINGS *v.* BILLINGS.

11 Pick. 461.—1831.

ON a libel for divorce *a vinculo* on account of adultery committed by the husband, it was proved that the husband had been out of the commonwealth and separated from his wife for fourteen years, and it appeared by his own confessions, contained in a letter in which he expressed his penitence and desired a reconciliation with his wife, that he had been living with another woman, by whom he had five children. Morton, J., before whom the trial took place, said he had advised with the other judges on the question, whether the libelee's confessions of adultery were alone sufficient evidence to authorize a decree of divorce; that the reason for requiring other evidence is, in general, to prevent collusion; that the circumstances here proved by other evidence than the confessions showed there could be no collusion; and that all the court were of opinion that the proof of the adultery was sufficient.

Divorce decreed.

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#### CUMMINS *v.* CUMMINS.

47 NEB. 872.—1896.

ERROR from the District Court of Douglas county.

No appearance for defendant in error.

IRVINE, C. The plaintiff in error brought this action to procure a divorce from the defendant in error. Service was had by publication. There was no appearance by the defendant in error, but on the evidence the court found for the defendant and dismissed the case. The errors assigned are that the judgment is not sustained by sufficient evidence; that it is contrary to law; and that the court erred in overruling the motion for a new trial. The grounds assigned in this motion are that the judgment is not sustained by sufficient

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<sup>1</sup> As to recrimination in a jurisdiction where only adultery is ground for absolute divorce and cruelty is ground for limited divorce, see *Uhlmann v. Uhlmann*, 17 Abb. N. C. (N. Y.) 236, and *Griffin v. Griffin*, 23 How. Pr. (N. Y.) 183. Recrimination of cruelty is not sufficient to bar divorce for adultery



evidence, and that it is contrary to law. We have, therefore, presented, in effect, simply the sufficiency of the evidence. The ground on which the divorce was claimed was cruelty practiced by the wife against the husband. The husband's testimony is to the effect that the defendant had always been harsh and unkind to him; that she had refused to cook for him, wash for him, and mend his clothes; that she had denied him sexual intercourse, and that certain events had persuaded him that she had attempted to poison him. The last charge, if true, undoubtedly constitutes cruelty (1 Nelson, Divorce and Separation, secs. 266, 308), but the sufficiency of the evidence to establish an attempt to poison was in the first instance for the trial court, as was the sufficiency of the evidence on other branches of this case. The evidence on this subject was that, after two successive meals, the plaintiff was taken violently sick. Thereafter he detected some foreign substance in his coffee cup, and observed his wife pouring something from a paper into the coffee. He found some article in her possession which he supposed to be the same substance, but he had made no effort to ascertain its character. The parties had three children, aged seventeen, nineteen, and twenty-two years. The plaintiff, it appears, knew where these children were. They were living in the household at the time of these events. They remained with their mother after the separation and their testimony was not produced. The plaintiff was corroborated in some parts of his testimony by a woman who had lived next door to the parties in Kansas, and who testified that she had done washing for the plaintiff and had heard the defendant use harsh and abusive language toward him. His testimony was not corroborated in other particulars. It has been said that the state is a third party to all divorce cases. It is not true that a petition stands confessed because not answered; nor is the judge who tries a divorce case obliged to find for the plaintiff, simply because he testifies to a state of facts, which, if believed, would warrant a decree in his favor. The judge should be satisfied that there is no collusion; that the case is prosecuted in good faith, and that a cause of action exists. This case was begun scarcely seven months from the time the plaintiff came to the state, which was the time of separation. He had then left his wife and his three children behind him, the children choosing to remain with the mother. The parties had lived together for more than twenty-two years. The charges of harshness and unkindness were proved only in the most general and vaguest way. The charge that the wife had refused to do the cooking, laundry work and mending for the family was probably not the charge of a very great offence, in view of plaintiff's testimony that

his earnings were \$140 per month. The charge of denying the plaintiff sexual intercourse was as vaguely substantiated as the charge of unkind language. It did not appear for what period or under what circumstances there had been such denial. The charge of poisoning was in no degree corroborated, while the evidence showed that through the children and the services of a chemist corroboration might have been obtained had the charge been true. If the trial judge had seen fit to grant a divorce upon the testimony, we would not disturb his action, but in such cases so much depends upon the manner and demeanor of the witnesses that, in view of the weakness of the evidence in this case, while it would be sufficient to support a different finding, we cannot disturb the finding which was made. 2 Nelson, Divorce and Separation, sec. 809.

Judgment affirmed.<sup>1</sup>

### *Alimony.*

#### HENINGER *v.* HENINGER.

90 VA. 271.—1893.

LEWIS, P. This was suit for a divorce from bed and board, on the ground of cruelty on the part of the husband, the defendant below and appellant here. The Circuit Court decreed a divorce, and gave the custody of the five infant children to the wife. It also by a subsequent decree, ordered the defendant to provide for them a suitable home, and to pay, for permanent alimony and the support and education of the children, until the further order of the court, a thousand dollars a year, in two semi-annual instalments.

<sup>1</sup> "We agree with the learned judges of the General Term in their low estimate of the value in divorce cases of the evidence of prostitutes and private detectives. The courts have come to regard the uncorroborated evidence of such witnesses as insufficient to break the bonds of matrimony. (*Sopwith v. Sopwith*, 4 Sw. & Tr. 246; *Ginger v. Ginger*, L. R., 1 P. & D. 38; *Banta v. Banta*, 3 Edw. Ch. 295; *Turney v. Turney*, 4 Id. 566; *Platt v. Platt*, 5 Daly, 295; Anonymous, 5 Robt. 611.) The consequences which follow a judgment of divorce are so serious and momentous that such a judgment should not be granted without the evidence which furnishes the basis therefor, is, after very careful scrutiny, satisfactory and such as can command the confidence of a careful, prudent and cautious judge. But the illicit amours of faithless husbands and wives are usually clandestine, and their wicked paths are hidden from public observation; and hence courts must not be duped, and they must take such evidence as the nature of the case permits, circumstantial, direct or positive, and bringing to bear upon it the experiences and observations of life, and thus weighing it with prudence and care, give effect to its just preponderance."—EARL, J., in *Moller v. Moller*, 115 N. Y. 466, 468. But see *Winston v. Winston*, 165 N. Y. 553, that the above statement, as to the uncorroborated evidence of such witnesses, is not a rule of evidence, but a rule for the "guidance of judicial conscience."

The evidence in support of the charges of cruelty is ample and conclusive, and there is no doubt that a divorce and the custody of the children were rightly granted to the wife. The defence set up in the answer that the complainant was persuaded by certain of her relatives hostile to the defendant to bring the suit merely to harass him and get possession of his property, and that the charge of cruelty is false — is not only not sustained, but is clearly disproven.

Unfortunately, however, the record, while full enough on these points, does not contain sufficient to enable us to satisfactorily determine what is a proper allowance for permanent alimony and the support and benefit of the children.

The appellant is a farmer and the owner of two tracts of land — one containing 596 acres, and the other 2,700 acres — situate in Tazewell, only a comparatively small portion of which is cleared. The residue is unimproved, much of it being "wild mountain land." The cleared portion, however, is valuable; but what is its value, or what ought to be taken as a fair estimate of the appellant's income, is not shown with any degree of certainty or precision.

One of the complainant's most intelligent witnesses, a farmer, who lives in the immediate neighborhood, estimates the annual value of both tracts at \$1,100, from which sum he deducts \$300 for taxes, repairs, etc., leaving \$800 as, in his judgment, the net annual value. Other witnesses put it lower, the estimate of one or more of them not exceeding five or six hundred dollars. It appears that shortly before the commencement of the suit the appellant sold the greater part of his personalty for the purpose, as he says, of paying his debts. The value of the residue does not appear. The commissioner, who was directed to make certain inquiries in the cause, reported, in general terms, that "the property now owned" by the appellant is worth \$30,000; but he says nothing, specifically, as to the income. In 1890, before the suit was commenced, the appellant contracted to sell the land for \$45,000, but the purchaser has refused to take it, and the matters in controversy between them in regard to the sale have not yet been settled. The case has been argued for the appellee largely on the assumption that the appellant is worth \$60,000, and that the annual value of his estate ought to be put at four per cent on that sum, or \$2,400; but this assumption, whatever the fact may be, is not warranted by the record.

In respect to alimony, the general rule is that the income of the husband, however derived or derivable, is the fund from which the allowance is made. 2 Bish. Mar. & Div. (5th ed.) sec. 447; *Bailey v. Bailey*, 21 Gratt. 43; *Cralle v. Cralle*, 84 Va. 198. In his recent work on Marriage, Divorce and Separation, sec. 1006, Bishop, in

treating of the facts upon which the amount of permanent alimony is determined, amplifies the rule, thus: "In exercising," he says, "the judicial discretion which regulates the amount of the permanent alimony, the judge should take into contemplation the past conduct of the parties, respectively, the source of the husband's property, what persons, if any, each is under a legal duty to support, the earnings and acquiring capabilities of each, the wife's pecuniary means equally with the husband's, the health of each, and their respective ages; and especially, but not exclusively, he should consider what sum, chargeable upon the faculties of the erring husband, will leave the financial condition of the innocent wife not inferior to what it would be if his conduct had been correct." And he adds that as every injury is, in law, entitled to its pecuniary compensation, the wife should have, in addition to the maintenance thus appearing, something for her physical and mental sufferings, and the loss of the husband's society.

So, also, the amount for maintenance of the minor children, when, as in the present case, they are assigned to the wife, depends, not only on their needs, but on the husband's fortune and station in life, and all the circumstances of the particular case. As to this matter, as in the case of alimony, the court, with all the attainable lights before it, must exercise a sound discretion. *Harris v. Harris*, 31 Gratt. 13; *Bailey v. Bailey*, *supra*.

The same considerations apply in regard to the education of the children. This, however, is denied by the appellant, on the ground that parents are not compellable to educate their children. It is true that while the elementary writers include among the duties of parents to their children that of education, it is a duty of imperfect obligation. Nevertheless, as Blackstone observes, it is a duty pointed out by reason, and of far the greatest importance of any. Chancellor Kent takes the same view, and adds the remark that "a parent who sends his son into the world uneducated does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance." 2 Kent's Com. 195.

It would be strange, then, if the effect of a decree, granting a divorce, and assigning the custody of the infant children to a suitable person, were held to relieve the offending parent of a duty he owes both to his offspring and to society, when he has the means to fulfill it. If this were the effect of the decree, the offender would make advantage of his own wrong, and the interference of the law, intended for the benefit of the children, might work an entirely different result.

The statute, now carried into section 3263 of the Code, authorizes



the court granting a divorce to make "such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care, custody, and maintenance of their minor children;" and while nothing is said in express terms about education, yet the evident purpose of the legislature was to give to the court the largest discretion in respect to the estate of the parties, and not to relieve the offending parent of any duty, moral, social, or otherwise. Under a statute authorizing the court to "make such disposition of and provision for the children as shall appear most expedient," the jurisdiction of the court to provide for their education, in a manner suitable to the parent's means and station in life has been held to be unquestionable; and the language of our statute is little, if any, less comprehensive. 2 Bish. Mar., Div. & Sep., sec. 1214.

For the reasons, however, already stated, the case must be sent back for a further reference to a commissioner in order that the court may be put in possession of all the facts and circumstances essential to an equitable determination of the rights of the parties. Meanwhile the decree of the 9th of December, 1891, making temporary provision for the wife and children, *i. e.*, requiring the appellant, among other things, to pay eighty dollars monthly for their maintenance, will remain in force. And when the case shall have been thus developed, it will be time enough to finally pass upon the question raised here by the appellee as to an additional allowance in the way of counsel fees.

The appellant will pay the costs of this appeal. Affirmed in part and reversed in part.<sup>1</sup>

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### TAYLOR, J., IN HADDON *v.* HADDON.

36 FLA. 413, 417.—1895.

THE law seems to be well settled that two things must concur, and must be made to appear before a court is justified in making any allowance to the wife in divorce proceedings for temporary alimony and for counsel fees. (1) A necessity therefor must appear on the part of the wife, from her want of means, or of sufficient means, to maintain herself during the litigation and with which to employ counsel; (2) and it must also appear that the husband has the pecuniary means to supply that necessity. 2 Bishop on Marriage and Divorce, sec. 929 *et seq.*; *Kenemer v. Kenemer*, 26 Ind. 330; *Porter v. Porter*, 41 Miss. 116; *Westerfield v. Westerfield*, 36 N. J. Eq. 195; *Maxwell v. Maxwell*, 28 Hun, 566; *Ross v. Ross*, 47 Mich. 185;

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<sup>1</sup> As to reduction of alimony upon re-marriage of the wife, see *Southworth v. Treadwell*, 168 Mass. 511.

*Turner v. Turner*, 80 Cal. 141; *Chaires v. Chaires*, 10 Fla. 308; *Underwood v. Underwood*, 12 Fla. 434. It is further well settled that the granting or withholding of such allowances is within the discretion of the court to whom the application therefor is made, but this discretion is not an arbitrary one, but is a judicial discretion to be exercised in accordance with established rules of law wisely adapted to the facts apparent in each particular case; and when the discretion is abused, it is a matter from which an appellate court will grant relief. *Cooke v. Cooke*, 2 Phillim. (Eng. Eccl.) 40; *Sanchez v. Sanchez*, 21 Fla. 346.

We think the order appealed from was one in violation of these established principles. The undisputed facts showed that the complainant wife here had equally as much, in fact considerably more, property and available means than the defendant husband, and that she acquired all of it from him within a year and a half before the bringing of her suit for divorce; and while she alleges that she has to support the children, it seems, if it be true, to be a voluntarily assumed burden upon her part. The requisite necessity upon her part for the allowance was conclusively shown to be absent, and her application therefor should have been denied.

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### HINDS *v.* HINDS.

80 ALA. 224.—1885.

THE original bill in this case was exhibited, on 6th January, 1885, by Adeline A. Hinds, by next friend, against her husband, Daniel Hinds, charging his desertion and abandonment of complainant without making any provision for her maintenance, and praying that reasonable alimony be decreed her out of his estate. The bill was subsequently amended so as to make parties defendant thereto, Mrs. W. F. Hanna and Mrs. Ephraim Allen, children of respondent, to whom he had, as alleged, fraudulently transferred substantially all his property, "in deliberate anticipation of oratrix's bill of complaint." The defendant, Hinds, demurred to the bill upon the grounds, *inter alia*, that there was "no bill pending for divorce *a vinculo matrimonii*;" that the bill would not lie "for alimony alone;" and that there was a misjoinder of parties defendant.

The decree of the chancellor overruling the demurrers is here assigned as error.

SOMERVILLE, J. The first question raised by the demurrer to the complainant's bill is, whether courts of equity in this state possess jurisdiction to grant alimony, in the nature of maintenance, to a

wife, unconnected with any proceedings for divorce. The bill alleges that the defendant abandoned the complainant, without any just excuse, and refused to live with her, or to make any provision for her support and maintenance. The prayer is for alimony, without seeking a divorce.

This question was fully discussed by this court in the case of *Glover v. Glover*, 16 Ala. 440, where, after an elaborate review of the authorities, the conclusion was reached that courts of equity exercised a jurisdiction over the subject of alimony, not merely incidental, but original, in cases where the wife's right to a maintenance exists. The broad ground upon which the jurisdiction is made to rest is the unquestionable duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty. The doctrine of this case was followed in *Mims v. Mims*, 33 Ala. 98, and again in *Wray v. Wray*, *Ib.* 187.

It may be admitted that the weight of authority, both in England and in this country, is opposed to the doctrine adopted in these cases, but the reasoning upon which this doctrine rests is logical and sound, and is supported by many well-considered decisions of our most respectable courts. Among these may be mentioned the courts of Mississippi, Iowa, Kentucky, California, South Carolina and Virginia — *Garland v. Garland*, 50 Miss. 694; *Graves v. Graves*, 36 Iowa, 310; *Logan v. Logan*, 2 B. Monroe, 142; *Galland v. Galland*, 38 Cal. 265; *Prather v. Prather*, 4 Desau's Eq. 33; *Rhame v. Rhame*, 1 McCord Ch. 197; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Almond v. Almond*, 4 Rand. 662.

Mr. Justice Story, in commenting on the rule settled in these cases, observes, that "there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted." 2 Story's Eq. Jur. sec. 1423a. See, also, Schouler on Husband and Wife, sec. 485; 2 Cord. on Leg. & Eq. Rights Mar. Women (2d ed.), sec. 958 *et seq.* Some of the states have accordingly seen fit to adopt it by statutory enactment, thus affirming confidence in its wisdom and sound policy. Without being unmindful of the force of the criticisms pronounced upon these cases by recent law writers, we are not willing to depart from or overturn the principle established by them, at this late day. 3 Pom. Eq. Jur. secs. 1120, 1299.

The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack for fraud any transfers or alienations of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony. Wait on Fraud. Conveyances, p. 140, sec. 90; *Turner v. Turner*, 44 Ala. 437.

The bill was not rendered multifarious by reason of the joinder of the several grantees as co-defendants in the suit. They are all grantees, or donees, of the same person. The several transfers spring out of the alleged common purpose to defraud the complainant, and the object and the purpose of the suit is single in seeking satisfaction of the complainant's demand out of the debtor's property which is alleged to have been fraudulently conveyed. *Russell v. Garrett*, 75 Ala. 350; *Lehman v. Meyer*, 67 Ala. 396; *Halstead v. Shepard*, 23 Ala. 558; *Fellows v. Fellows*, 15 Amer. Dec. 428-9.

The demurrer to the bill was properly overruled, and the decree of the chancellor overruling it is affirmed.<sup>1</sup>

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### *Legislative Divorce.*

#### MAYNARD v. HILL.

125 U. S. 190.—1887.

SUIT in equity to charge the defendants, as trustees of certain lands in Washington Territory and compel a conveyance thereof to plaintiffs. Appeal to the United States Supreme Court from a judgment of the Territorial Supreme Court sustaining the defendant's demurrer and dismissing the complaint.

David S. Maynard and Lydia, his wife, lived in Ohio in 1850. Two children, Henry Maynard and Francis Patterson, the plaintiffs in this suit, were the only issue of that marriage. In 1850, David deserted his wife and family, and on September 16th, 1850, took up his residence in Oregon Territory, in that part which is now Washington Territory, and resided there until his death, intestate, in 1873. Lydia A. died intestate in 1879. April 3d, 1852, he took up public land as a married man under the act of Congress of September 27th, 1850. December 22d, 1852, an act was passed by the legislative assembly of the territory purporting to divorce absolutely David S. Maynard from Lydia. About January 15th, 1853, he married Catharine Brashears, and they lived together until his death. April 30th, 1856, he made proof of his four years' residence on the land, and in accordance with the statute a certificate was issued to him apportioning the west half of the land to him and the east half to his wife Catharine. This certificate was afterwards annulled by the commissioner of the land office so far as the east half was concerned, and it was decided by the commissioner that neither wife was en-

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<sup>1</sup> But, after a decree of absolute divorce, the former wife cannot maintain a bill for alimony against the former husband.—*Downey v. Downey*, 98 Ala. 373.



titled to it. The first wife was not entitled to it because at the time of the divorce the husband had only an inchoate interest in the land, his future vested right being dependent upon past and future compliance with the statute, and she, therefore, never had a vested interest. The second wife was not entitled because she was not his wife on December 1st, 1850, or within one year from that date, which was a prerequisite under the statute. Subsequently the east half was again treated as public land and taken up by Hill and Lewis, the defendants, against whom this suit is brought by the plaintiffs, the heirs-at-law of the first wife.

MR. JUSTICE FIELD. As seen by the statement of the case, two questions are presented for our consideration: first, was the act of the legislative assembly of the territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties; and, second, if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claimed.

The act of Congress creating the territory of Oregon and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the territory in an assembly, consisting of two boards, a Council and a House of Representatives. 9 Stat. 323, c. 177, sec. 4. It declared, sec. 6, that the legislative power of the territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of the residents; and that all the laws passed by the assembly should be submitted to Congress, and if disapproved should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the territory to any loan. These exceptions from the grant of legislative power have no bearing upon the questions presented. The grant is made in terms similar to those used in the act of 1836, under which the territory of Wisconsin was organized. It is stated in *Clinton v. Englebrecht*, 13 Wall. 434, 444, that that act seemed to have received full consideration; and from it all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. There were in the Kansas and Nebraska acts,

as there mentioned, provisions relating to slavery, and in some other acts provisions growing out of local circumstances. With these, and perhaps other exceptions not material to the questions before us, the grant of legislative power in all the acts organizing territories, since that of Wisconsin, was expressed in similar language. The power was extended "to all rightful subjects of legislation," to which was added in some of the acts, as in the act organizing the territory of Oregon, "not inconsistent with the Constitution and laws of the United States," a condition necessarily existing in the absence of express declaration to that effect.

What were "rightful subjects of legislation" when these acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained. It will be found from the history of legislation that, whilst a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. *Loan Association v. Topeka*, 20 Wall. 655, 663. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any

other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature which can properly be conducted by the judicial tribunals. Yet such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual — such as the contracting by one of the parties of an incurable disease, like leprosy, or confirmed insanity or hopeless idiocy, or a conviction of a felony — which would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the legislature itself from interfering and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the states. Says Bishop, in his *Treatise on Marriage and Divorce*: "The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written constitution binding the legislative power." Sec. 664. Says Cooley, in his *Treatise on Constitutional Limitations*: "The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and

from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases." P. 110. Says Kent, in his Commentaries: "During the period of our colonial government, for more than one hundred years preceding the revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the legislature." 2 Kent's Com. 97. The same fact is stated in numerous decisions of the highest courts of the states. Thus, in *Cronise v. Cronise*, 54 Pa. St. 255, 261, the Supreme Court of Pennsylvania said: "Special divorce laws are legislative acts. This power has been exercised from the earliest period by the legislature of the province, and by that of the state under the Constitutions of 1776 and 1790. \* \* \* The continued exercise of the power, after the adoption of the Constitution of 1790, cannot be accounted for except on the ground that all men, learned or unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction of the people of their own instrument."

In *Crane v. Meginnis*, 1 G. & J. 463, 474, the Supreme Court of Maryland said: "Divorces in this state from the earliest times have emanated from the general assembly and can now be viewed in no other light than as regular exertions of the legislative power."

In *Stone v. Pease*, 8 Conn. 541, decided in 1831, the question arose before the Supreme Court of Connecticut as to the validity of a legislative divorce under the Constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that state on the subject of divorces, passed one hundred and thirty years before, which provided for divorces on four grounds, said, speaking by Mr. Justice Daggett: "The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the Parliament of Great Britain, and passed special acts of divorce *a vinculo matrimonii*; and at almost every session since the Constitution of the United States went into operation, now forty-two years; and for thirteen years of the existence of the Constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our state. We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent



interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the Constitution of the United States or by that of the state. In view of the appalling consequences of declaring the general law of the state or the repeated acts of our legislature unconstitutional and void — consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery, — the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void." It is to be observed that the divorce in this case was granted on the petition of the wife, who alleged certain criminal intimacies of the husband with others, and the act of the legislature recited that her allegation, after hearing her and her husband, with their witnesses and counsel, was found to be true. The inquiry appears to have been conducted with the formality of a judicial proceeding, and might undoubtedly have been properly referred to the judicial tribunals; yet the Supreme Court of the state did not regard the divorce as beyond the competency of the legislature.

The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the legislative assembly of the territory, that it was beyond the competency of a legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions was neither intended nor understood to exclude legislative control over the marriage relation. In most of the states the same legislative practice on the subject has prevailed since the adoption of their constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years in many constitutions of provisions prohibiting legislative divorces would also indicate a general conviction that without this prohibition such divorces might be granted, notwithstanding the separation of the powers of government into departments by which judicial functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the Supreme Court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their state constitutions. *Sparhawk v. Sparhawk*, 116 Mass. 315; *State v. Fry*, 4 Mo. 120, 138. The weight of

authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are, therefore, justified in holding—more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature. If within the competency of the legislative assembly of the territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the territory, and as he acted soon afterwards upon the dissolution and married again we may conclude that the act was passed upon his petition. If the assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the territory, is undoubted, unless the marriage was a contract within the prohibition of the Federal Constitution against its impairment by legislation, or within the terms of the ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act, questions which we will presently consider.

The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support, or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation, and if the facts stated had been brought to the attention of Congress, that body might, and probably would, have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the assembly to pass the act.

The organic act extends the legislative power of the territory to all rightful subjects of legislation "not inconsistent with the Constitution and laws of the United States." The only inconsistency suggested is, that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the Federal Constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the Supreme Court of the territory, to legislation by territorial legislatures, we are clear

that marriage is not a contract within the meaning of the prohibition. As was said by Chief Justice Marshall in the *Dartmouth College Case*, not by way of judgment, but in answer to objections urged to positions taken: "The provision of the Constitution never had been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." 4 Wheat. 629. And in *Butler v. Pennsylvania*, 10 How. 402, where the question arose whether a reduction of the *per diem* compensation to certain canal commissioners below that originally provided when they took office, was an impairment of the contract with them within the constitutional prohibition, the court, holding that it was not such an impairment, said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property are vested." p. 416.

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract — generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization — it is something more than a mere contract. The consent of the parties is, of course, essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams v. Palmer*, 51 Me. 481, 483. Said that court speaking by Chief Justice Appleton: "When the contracting parties have entered into the marriage state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can

neither be modified nor changed by any agreement of parties. It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other." And again: "It is not, then, a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress." pp. 484, 485 And the Chief Justice cites in support of this view the case of *Maguire v. Maguire*, 7 Dana, 181, 183, and *Ditson v. Ditson*, 4 R. I. 87, 101. In the first of these the Supreme Court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligations of contracts. In the second case, the Supreme Court of Rhode Island said that "marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship,' is a contract."

In *Wade v. Kalbfleisch*, 58 N. Y. 282, 284, the question came before the Court of Appeals of New York whether an action for breach of promise of marriage was an action upon a contract within the meaning of certain provisions of the Revised Statutes of that state, and in disposing of the question the court said: "The general statute, 'that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract, to which the consent of parties, capable in law of contracting, shall be essential,' is not decisive of the question. 2 R. S. 138. This statute declares it a civil contract, as dis-



tinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word contract employed in the common law or statutes. In this state, and at common law, it may be entered into by persons, respectively, of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."

In *Noel v. Ewing*, 9 Indiana, 37, the question was before the Supreme Court of Indiana as to the competency of the legislature of the state to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage; and the court said: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a status had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a status or institution. As such, it is not so much the result of private agreement as of public ordination. In every enlightened government, it is preeminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." pp. 49 50. In accordance with these views was the judgment of Mr. Justice Story. In a note to the chapter on marriage, in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belongs to ordinary contracts." Sec. 108 n.

The 14th section of the organic act of Oregon provides that the inhabitants of the territory shall be entitled to all the rights, privileges and advantages granted and secured to the people of the territory of the United States, northwest of the river Ohio, by the articles of compact contained in the ordinance of July 13, 1787, for the government of the territory. The last clause of article two of that ordinance declares "that no law ought ever to be made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed." This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the Federal Constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the donation act. 9 Stat. 496, c. 76. But that act conferred the title of the land only upon the settler who at the time was a resident of the territory, or should be a resident of the territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. The words of the act, that "there shall be, and hereby is, granted to every white settler or occupant," is qualified by the condition of four years' residence on the land and its cultivation by him. The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title, what is sometimes vaguely called an inchoate interest. In some of the cases decided at the circuit, the fourth section of the act was treated as constituting a grant *in presenti*, subject to the conditions of continued residence and cultivation, that is, a grant of a defeasible estate. *Adams v. Burke*, 3 Sawyer, 415, 418. But this view was not accepted by this court. In *Hall v. Russell*, 101 U. S. 503, the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditions were fully performed. After citing the language of a previous decision, that "it is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress," the court said: "There cannot be a

grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future, and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law, and actually in existence at the time \* \* \* Coming then to the present case, we find that the grantee designated was any qualified 'settler or occupant of the public lands \* \* \* who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act.' The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory, having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." In *Vance v. Burbank*, 101 U. S. 514, 521, the doctrine of the previous case was reaffirmed and the court added: "The statutory grant was to the settler, but if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband."

When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation which gave him anything more than a mere possessory right; a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced, has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right.

It follows that the wife was not entitled to the east half of the donation claimed. To entitle her to that half, she must have continued his wife during his residence and cultivation of the land. The judgment of the Supreme Court of the territory must therefore be affirmed; and it is so ordered.

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*Effect of Divorce.*

IN THE MATTER OF THE ESTATE OF ENSIGN, DECEASED.

103 N. Y. 284. — 1886.

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made the first Tuesday of June, 1886, which affirmed a decree of the surrogate of the county of Erie, dismissing the petition of Jennie Ensign Martin, which asked to have set aside the probate of the will of Elisha W. Ensign, deceased, and ratifying and confirming the decree admitting the will to probate.

It appeared that the deceased and the petitioner were married in 1867, and lived together as man and wife until 1875; that a child was born of said marriage in 1869, which died soon after; that in December, 1875, a decree of divorce was granted, in an action brought by her against her husband, because of adultery, on his part, and in 1877 she married again. The will, which was admitted to probate, was executed before their marriage. No citation or notice of the probate proceedings was served upon or given to the petitioner. The petitioner claimed that the will was void because of the subsequent marriage and birth of issue, and that she as "widow" was entitled to a distributive share in his personal estate, and to notice of the proceedings for the probate of the will.

FINCH, J. A statutory construction, unchallenged for more than half a century, is assailed on this appeal.

That a divorced wife, however innocent, has no right to a distributive share in the personal estate of her divorced husband, upon his death intestate, has been conceded until a very recent period, but is now asserted to have been all the time a mistake, which should be at last corrected.

A single provision of the statute relating to divorce gives color to the construction sought. Where the decree is founded upon the misconduct of the wife, it is expressly provided that "she shall not be entitled to dower in her husband's real estate or any part thereof,



nor to any distributive share in his personal estate." (2 R. S. 146, § 48.) On the theory that this was a needed provision to bar the guilty wife of dower, it is argued that it was thought also a needed provision to bar distribution, and the inference is drawn that without such prohibition, or where by reason of the divorced wife's innocence it could not apply, the legislature supposed she would be so entitled, and intended to leave her, when free from fault, in the possession of both rights to their full extent. But it is quite evident that we have here an unnecessary and superfluous provision as it respects dower. In a previous part of the Revised Statutes (1 R. S. 740, § 8), under the title relating to estates in dower, it had already been declared that in case of a divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed. This provision was needed to cut off the inchoate dower of the wife in property of the husband acquired prior to the decree, and was useless beyond that, and so operative for that purpose only. The added provision of section 48 was, therefore, needless. It is conceded to have been a mere "repetition," having no excuse except that over-caution which is sometimes as dangerous as neglect. In the same statute there is a second instance of like superfluous legislation. It is provided that the dissolution of the marriage contract shall not affect the legitimacy of the children. (2 R. S. 145, § 43.) In *Wait v. Wait*, 4 Comst. 95, it was said of this provision, "No one, however, will pretend that such a provision, though for greater caution it may have been wise to adopt it, was in fact necessary." And the court admitted that this needless care bore "to some extent" upon the prohibition of dower in section 48. There were thus, concededly, two instances of needless caution in the statutes under consideration, and others ought not to surprise us. Ascertaining that the clause relating to dower was useless, we may expect to find that equally true of the following one relating to distribution. The revisers omitted it in their draft, but the legislature added it. At that time no right to distribution had ever been conceded to the divorced wife, but the law had been administered to the contrary, and with the full knowledge of that fact in the mind of the legislature, it is difficult to conceive an intent to change the rule in so important a matter left to be evidenced merely by an indirect inference, and not affirmatively and expressly declared.

The rule as it then stood rested upon very clear and definite grounds. The statute of divorce began with a provision permitting a marriage to be annulled for specific reasons. In such case no marital rights could exist on either side, since the decree adjudged that a lawful marriage had never existed. But then came pro-

visions for a dissolution of the marriage contract. In such case the contract is ended and terminated by the decree of the court. The relation of husband and wife, both actual and legal, is utterly destroyed, and no future rights can thereafter spring out of or arise from it. Existing rights already vested are not thereby forfeited, and are taken away only by special enactment as a punishment for wrong. But future rights dependent upon the marital relation and born of it there can be none. Thus, the wife's dower at the date of the decree is vested as an inchoate right, at least as against the husband, whether she be innocent or guilty, by the concurrence of marriage and seizin. It has fastened upon the land and follows it as an incumbrance and would become consummate upon the death of the husband in either event, but for the express mandate of the statute which forfeits it where the wife is the guilty party. But the wife, although blameless, acquires no dower right in lands conveyed to the husband after the divorce because he was not seized during the coverture. *Kade v. Lauber*, 16 Abb. Pr. [N. S.] 288. The coverture is ended and cannot serve to found a new right after its destruction. The existing inchoate right remains, because it has already accrued, has not been forfeited by guilt, and does not depend upon the continuance of the marriage relation, but independent of that continuance becomes consummate by the death of him who was the husband when it sprang into being. For the same reason that future rights, dependent for their origin upon the marriage relation, cannot arise after its dissolution, and which prevents the innocent wife from having dower in her husband's after-acquired lands, it follows that she can have no distributive share in his personalty. At the date of the decree she has no existing right in his personal estate. That is his. No fraction of it and no lien upon it are hers. He may sell it without her consent, give it away if he pleases, and bequeath it at his own free choice. If it remains his at his death then the wife, if the marriage relation exists, and has not been sundered, becomes "the widow" named in the statute of distribution, and at that moment, for the first time, arises her right in the personal estate dependent upon the existence of the marriage at the husband's death. Administration is given, first, "to the widow." The law contemplates the possible existence of but one, and makes no provision for a struggle of priority between two or more. To "the widow" is given one-third of the personal estate and all the other provisions allowing her occupation of her husband's house, and setting apart for her specific articles of household use, indicate the understanding of the legislature that she only was "the widow" who held to the deceased, at the date of his decease, the relation of a wife. Otherwise the stat-

utes, meant to be both just and generous, become fomentors of discord, and plan for bitterness and war. The divorced wife is not "the widow." She may be the lawful wife of another man, and the deceased may have lawfully remarried in another state, or by permission of the court in this, and it would follow, if the appellant is right, that a woman may be a widow although her lawful husband is living, and that an intestate may leave two widows with equal rights to administration and distribution. Suppose that, with unusual activity, he should leave four. How would each get one-third of the personalty? And were the children of any account in the scheme of distribution? In one event "the widow" is entitled to the whole surplus. The appellant's counsel solves the struggle for priority by applying to the later wives, with a sort of grim humor, the maxim *caveat emptor*, but the suggestion is not quite adequate to unsettle the law and unite at desired points a severed bond. When the court dissolves the marriage contract at the suit of the innocent wife, it is authorized to decree the payment to her of a suitable allowance. And why is that? If any marital right continues after the divorce, the wife remains entitled to her support and may enforce it in the ordinary way. On the contrary the statute recognizes that when the marriage tie is broken, and the relation ended, no future rights will remain to the wife, and no future obligations bind the husband which have their root in the marriage relation. The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife which the divorce cuts off and forbids in the future. The tribunal granting the decree investigates the husband's financial condition, takes proof of the value of his property, and then makes a suitable allowance for her life, and so puts the decree and its power in the place and room of what is lost in the future.

If because the wife is innocent the marriage relation in any degree subsists as against the husband, we must confront the anomaly of a contract adjudged to have been dissolved, and yet remaining not dissolved as to one of the parties, and read in the decree that both sides are free from the obligations of the marriage contract, when the court pronouncing it knows it to be false, since some obligations of the husband will remain. The distinction drawn on behalf of the appellant between rights and obligations does not relieve the difficulty, for it is impossible to conceive of a right of the wife which does not impose upon the husband a corresponding obligation. The true theory of the statute is, that from the date of the decree no existing and vested rights are forfeited except by the express mandate of the statute, but since the marriage contract ends and the

relation terminates, no future marital right or obligation can arise for or against either. In place of them stands the decree of the court, looking beyond the bond it is about to sever, recognizing the inevitable consequences to follow the uplifted arm, and providing for the innocent wife or husband by its own mandate that reparation which, after the decree, is possible from no other source.

Nothing decided in *Wait v. Wait (supra)*, upon which the appellant so much relies, is at all to the contrary. The question there was over the right of the innocent wife to dower in the lands of which the husband was seized before the divorce, and, therefore, during coverture. The argument against that right assumed as not open to contradiction that the divorce ended the marriage so that none of its future rights or obligations could survive, and then sought to show that the wife's inchoate dower was a mere possibility or expectation, having no tangible existence until in the future following the decree. This court met the argument exactly at that point and asserted as the sufficient answer, what we have already pointed out, that the wife's dower, by the concurrence of marriage and seizin, attached to the land as a fixed and vested right, not to be shaken off unless by her consent or some declared forfeiture or decree of the sovereign power, and then argued that the dissolution of the marriage operated prospectively only, and so had no retroactive effect upon a right already vested. Observe that the ground taken was not that the marriage relation in any respect survived the divorce. If it had been, the argument founded on the character of the inchoate dower as a vested right would have been pointless and unmeaning. And while there are in the opinion expressions indicating a belief in some sort of continuance of the marriage relation after the decree, they were unessential to the decision and were not the ground upon which it stood.

The further argument of the appellant rests upon the statute against bigamy and our construction of it in *People v. Faber*, 92 N. Y. 146. The statute relating to divorce prohibits the guilty defendant from marrying again, and a clause to that effect is usually inserted in the decree. This was needless and another instance of superfluous care, if the marriage relation survived the divorce, as against the guilty party, and the express prohibition is here an argument against that theory of equal character and force with that derived by the appellant from sec. 48. But in spite of the prohibition and because the divorced husband no longer had a wife living, it was held in *People v. Hovey*, 5 Barb. 117, that his after marriage, although punishable as a contempt, did not constitute the crime of bigamy. We overruled that decision, but not at all upon



the ground that the divorced wife remained the culprit's wife in any sense or respect, but for the reason that the statute by its express words disclosed an intention to make the crime of bigamy consist not only in marrying a second time while the first wife was living, but in so marrying while under the prohibition of the law, and during the life of the woman who had been the wife before the decree of divorce. We construed these specific words as intended to force such a case into the meaning of the statute which without them would not at all have embraced it, and without them would have led us to affirm *People v. Hovey*. Surely nothing was further from our thought and from the careful reasoning of the opinion that an idea that the divorced wife remained a wife as to the defendant, and that he was a bigamist for that reason. We held him to be such because the statute put him "in the situation" of one having a wife living, "for the purpose" of enforcing the statutory provision.

The recent legislation which permits a divorced husband, prohibited from re-marrying, to do so after five years and with the consent of the court, and the class of cases which affirm the validity of such second marriage in another state over whose boundaries our own prohibition does not extend, are alike inconsistent with any doctrine which makes the marriage relation as to either of the parties remain in existence after the dissolution of the contract and the severance of the bond. With the exception of a single case in the Supreme Court, itself overruled, the statutes and decisions are in entire harmony with the practice and the rule which has so long prevailed. We are of opinion that it should not be changed.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.<sup>1</sup>

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<sup>1</sup> STATUTORY PROHIBITION AGAINST THE REMARRIAGE OF THE GUILTY SPOUSE — *Remarriage Outside the State of Domicile*. — "There is no question as to the general rule that a marriage, which is valid by the law of the place where it is solemnized, is valid everywhere. Of course even this general rule has its exceptions where the particular marriage is contrary to good morals or public policy, or to the positive statutes of the country where it is sought to be enforced. But where a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals, and contrary to public policy, leave their domicile and enter another, for the express purpose of violating the law of their domicile in this respect, the case is highly exceptional and the great weight of authority is against the validity of such a marriage in the place of their domicile. There have been conflicting decisions upon the question, but very few of them sustain the validity of the relation where it has been assumed for an intended evasion of the law of their domicile and is contrary to good morals. The fact

of such an intended evasion has been repeatedly recognized as the basis of invalidity when otherwise validity would have been declared." — *Estate of Stull*, 183 Pa. 625.

*Contra*, "It is a general rule of law that a contract entered into in another state or country, if valid according to the law of that place, is valid everywhere. \* \* \* And coming to the case in hand the rule recognizes as valid a marriage considered valid in the place where celebrated. \* \* \* The real question is whether such a statute furnishes an exception to the maxim, *leges extra territorium non obligant*. \* \* \* The statute does not in terms prohibit a second marriage in another state, and it should not be extended by construction." — *Van Voorhis v. Brintnall*, 86 N. Y. 18. But under the New York statutes remarriage within New York constitutes bigamy. *People v. Faber*, 92 N. Y. 146.

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### *Agreement to Separate.*

(See *ante*, pp. 110–117.)

## PART II.

### PARENT AND CHILD.

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#### *Custody of the Child.*

#### CORRIE *v.* CORRIE.

42 MICH. 509.—1880.

GRAVES, J. This is a certiorari to review certain proceedings had in the Circuit Court on *habeas corpus* between parents relative to the custody of their child. The parents are, in fact, living apart and the child, Fannie C. Corrie, who is a little over seven years old, is with her mother in Detroit. The proceedings were instituted by the father; the mother, at the hearing, exhibited her answer on oath, and the court declined to transfer the custody.

On the presentation of the answer the petitioner filed a general traverse, but without oath. He offered no sworn contradiction or explanation of the matters in the answer, and no evidence was adduced on either side. He contends that such matters in his petition as were not particularly met by the answer were admitted, and that sufficient was then made out to entitle him to an order for the custody of the child. On the other hand, the respondent claims that the facts set forth in the answer, to which no sworn denial has been attempted, and which, as is said, must therefore be taken as true for the purpose of this proceeding, are full to show the unfitness of the petitioner for the trust he seeks, and constitute a complete reply to the application.

In contests of this kind the opinion is now nearly universal that neither of the parties has any rights that can be allowed to seriously militate against the welfare of the child. The paramount consideration is what is really demanded by its best interests. It is doing no violence to what is taught by judicial experience to assume that the disputing parties will be more alive to the satisfaction of their own feelings and interests than to the true end of the inquisition; while the innocent subject of the contention is utterly unable to speak or act for itself, and is in danger of being lost sight of in the strife for its possession. No other occasion can call more loudly for judicial vigilance in reaching for the exact truth, and in putting aside with

an unsparing hand the mere technicalities of procedure. The fate or interest of the child is not to depend on what the parties may see proper to state or to evade in their formal altercations, nor on any artificial rule of pleading. There should be full inquiry and an exhaustive examination on oath in order that the tribunal may have all the light practicable.

As already stated, the hearing below proceeded on the petition and answer, and the petitioner did not assume to controvert any of the facts alleged on oath by the respondent. As these facts, if true, were sufficient to show that the petitioner was not a suitable person to take charge of the child, we fail to see that any case was made out to require a shift of the custody. We deem it proper to add that we do not re-examine on certiorari the evidence upon the hearing in *habeas corpus*. We are confined to questions of law. If a consideration of evidence is required, we suppose the proper way to be to take a *habeas corpus* from this court.

The order is affirmed with costs.

The other justices concurred.

## THE CHANCELLOR IN MERCEIN *v.* THE PEOPLE.

25 WEND. (N. Y.) 64, 93.—1840.

[THE chancellor in delivering orally his opinion, said:] It had, however, been argued at great length here, and the American cases referred to showed it to be the established law of this country that the court, or officer, were authorized to exercise a discretion, and that the father was not entitled to demand a delivery of the child to him, upon *habeas corpus*, as an absolute right. That this was also the law of England at the time of our separation from the mother country; though, he said, the decisions of the English courts since that period, appeared to have gone back to the principles of a semi-barbarous age, when the wife was the slave of the husband, because he had the physical power to control her, and when the will of the strongest party constituted the rule of right. Thus in *De Manneville's Case*, 5 East, 220, the Court of King's Bench refused to interfere, although a brutal husband had torn a child only eight months old from the breast of its mother, for the mere purpose of coercing his wife to give him the control of her property. Also in *Skinner's Case*, 9 J. B. Moore's R. 278, the child was kept from its mother under the control of her husband and his mistress, with whom he was living in open adultery; and yet the courts refused to interfere by *habeas corpus* to restore the child to the innocent and much injured wife



and mother. In both of these cases, however, the child was in the custody of the father, and it was the mother who sued out the writ to endeavor to induce the court to take that custody from him. But in the subsequent case of *Greenhill*, 4 Ad. & Ellis, 624, the children were in the custody of their mother, and the husband, who was living in adultery with another woman, brought a *habeas corpus* and obtained an order upon his wife to deliver up the children to him, and the injured wife, in that case, was actually compelled to flee with her children to a foreign land, to obtain protection against the inhumanity and immorality of what was then declared to be the English law. That it was in reference to this last case that Lord Denman, C. J., of the Court of King's Bench, who had concurred in the decision, in accordance with what he supposed the recent cases had then settled as law, declared in the House of Lords, that the state of the law on this subject was such as to make all the judges ashamed of it; and that Serjeant Talfourd, to his everlasting honor, although he had been the counsel for the husband, immediately brought a bill into parliament to change the law, and to restore the mother to her natural right to be put upon an equality with her husband in relation to the care and custody of her children within the age of nurture, and finally succeeded in carrying his bill through both houses of parliament, by a large majority; though it was once defeated in the House of Lords.

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*Maintenance of the Child.*<sup>1</sup>

KELLEY *v.* DAVIS.

49 N. H. 187.—1870.

ASSUMPSIT by Alfred Kelley, surviving partner of Kelley & Cleasby, against John K. Davis, for goods sold and delivered by the plaintiffs to Gilbert C. Davis, the minor son of the defendant, during the

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<sup>1</sup> PROTECTION OF THE CHILD. "From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoined by any municipal laws; nature in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery. \* \* \* " Blackstone, Commentaries, I. 450. But a parent has been held not bound to pay counsel fees for the defence of his minor son upon the son's trial for murder. *Hill v. Childress*, 10 Yerg. (Tenn.) 514.

EDUCATION OF THE CHILD. Though it is sometimes said in judicial *dicta* that there is a duty upon the parent to educate his children, it seems to be a moral

winter of 1866, to the amount of \$58.33. The plaintiffs sought to charge the defendant on the ground that the goods sold to said Gilbert were necessities, suitable to his degree and station in life, and that the father, the defendant, should pay for them.

FOSTER, J. "The duty of parents to provide for the maintenance of their children," says Blackstone, "is a principle of natural law." "It is an obligation," says Puffendorf, "laid on them not only by nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. And thus the children have a perfect right of receiving maintenance from their parents." "But," says Mr. Wendell in his note 3, to 1 Bl. Com. 448, "the common law of England never afforded any means of enforcing this right;" and Mr. Chitty, in his note to 1 Bl. Com. 458a, says "there is no legal obligation on a parent to maintain his child, independent of the statutes; and, therefore, a third person, who may relieve the latter, even from absolute want, cannot sue the parent for reasonable remuneration, unless he expressly or impliedly contracted to pay." In support of this proposition he cites *Le Blanc, J.*, in 3 East, 85, T. Raym. 260; *Palmer*, 559, and 2 Stark. 551.

And such, therefore, is the condition of the common law in this country. *Gordon v. Potter*, 17 Vt. 348. Neither do the statutes of New Hampshire afford any remedy for enforcing this right, against a parent so reckless of moral duty as to refuse to recompense a neighbor who may have relieved the want and suffering of his child. Our statute laws, like the English statutes of 43 Eliz. and 5 Geo. 1, from which they were borrowed, are intended only for the indemnity of the public against the maintenance of paupers, and not for the reimbursement of an individual who may have relieved the necessities of a poor person in suffering and distress; and under our statute no action can be sustained against a parent to recover for necessities furnished to his child, except by the town, and after notice to the person chargeable. Gen. Stats. ch. 74; *Farmington v. Jones*, 36 N. H. 271.

This view of the matter may, at the first glance, seem startling, as opposed to our natural sense of justice; since the duty of parents to provide reasonably for the maintenance and education of their children, until they shall be of sufficient age and capacity to provide for themselves, is so clearly obvious to the mind and conscience, and

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and not a legal duty. See Schouler, *Domestic Relations*, 4th ed., § 235, and Tiffany, *Persons and Domestic Relations*, § 118, and cases cited. See, also, *Heninger v. Heninger*, 90 Va. 271, reported herein, *supra*. That it is a legal duty, *Collins v. Cory*, 17 Times Law Reports, 242 (1901).

so clearly prescribed by the positive precepts of religion, (for St. Paul says that "if any provide not for his own, and especially for those of his own house, he hath denied the faith and is worse than an infidel"), that a violation of this duty, should, it would seem, be visited with severe punishment by human laws.

But the reasoning for this seeming defect in the law is said by Mr. Chitty to be that the common law considered moral duties of this nature as better left in their performance to the impulses of nature; or, as Chancellor Kent remarks, 2 Com. 189, "the obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws." Paley's Moral Philosophy, 226. Therefore the liability of the parent, in England and in this country is, as we have seen, founded solely upon contract, express or implied.

But, notwithstanding the feeble and scanty provisions of the common and statute law in this respect, it is held to be an indictable offence on the part of a parent, of sufficient ability, to refuse or neglect to provide sufficient food, bedding, etc., to the injury of the health of any infant of tender years, servant, apprentice or child, unable to provide for itself, whom the party is obliged by duty or contract to provide for. *Rex v. Friend*, Russ. & Ryan's Cr. Cas. 20; *In the Matter of Ryder*, 11 Paige Ch. 185.

On the other hand, the obligation of a parent, where the circumstances are such as to authorize the implication of a promise or contract to pay for necessities provided by another for his child, is not unrestricted in its requirements, but is guarded by wise and reasonable limitations. "For the policy of our laws" (says Blackstone) "which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will to provide them with superfluities and other indulgences of fortune, imagining that they might trust to the impulse of nature, if the children were deserving of such favors." 1 Bl. Com. 449. And by Statute 59 Geo. III, ch. 12, sec. 26, the penalty on refusal of the father to provide such maintenance for his minor children as two justices of the peace shall direct, is no more than twenty shillings a month, though the amount of maintenance is not limited by the amount of the penalty for disobedience, and the father's goods may be restrained therefor.

The legal obligation of the father, therefore, to pay for necessities furnished a minor child rests upon contract alone; and where a parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child, even for necessities.

than a mere stranger would be. Chitty Cont. 166 (10th Am. ed.) In declaring this proposition the learned author is sustained by a strong current of authorities.

Thus, in *Shelton v. Springett*, 20 Eng. L. & Eq. 281, it is said, "a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority be proved, or the circumstances be sufficient to imply one;" and it is also said, in the same case, that the mere obligation to provide for the child's maintenance, affords no legal inference of a promise.

And in *Mortimer v. Wright*, 6 M. & W. 482, Lord Abinger said: "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be." And that "the mere moral obligation on the father to maintain his child, affords no inference of a legal promise to pay his debts." "To bind the father, in point of law, for the debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person;" and Parke, B. said a father was under no legal obligation to pay his son's debts, except, indeed, by proceedings under the statute; the mere moral obligation imposing no legal liability. See, also, *Blackburn v. Mackey*, 1 C. & P. 1; *Fluck v. Tollemache*, Id. 5; *Rolfe v. Abbott*, 6 C. & P. 286; *Gordon v. Potter*, 17 Vt. 348; *Varney v. Young*, 11 Vt. 260; *Raymond v. Loyl*, 10 Barb. 483; *Chilcott v. Trumble*, 13 Barb. 502; 2 Kent's Com. 190, note 3 (11th ed.).

Although the rule has not been declared in terms so strong and explicit by our own courts, still, we think the decisions in this state are not in conflict, but in accordance with, the rule as heretofore stated and as applied in the cases to which we have referred.

Our courts seem to have followed the decision in *Van Valkinburg v. Watson*, 13 Johns. 480, in which it is said that "if the parent neglects that duty" (to furnish necessities for his infant children) "any other person who supplies such necessities, is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent."

It is obvious here that the necessity for a contract—"promise"—is not dispensed with, but expressly declared, in the learned chancellor's view of the case; and the rule as stated by him is shown to be not less stringent than that declared by Abinger, C. B., Parke B. & Mr. Chitty, when practically applied, for, in the same case, the party furnishing the goods to the minor child is held to the exercise of extreme diligence in inquiring into the condition of the parties, parent and child, before he can ask a jury to find from the circum-



stances of the case an implied promise on the part of the parent; and, "what is actually necessary," he says, "will depend upon the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril."

And we do not understand the case of *Pidgin v. Cram*, 8 N. H. 352, as going to the extent of dispensing with the necessity for a contract or promise on the part of the parent, as the essential foundation of his legal obligation, but only as indicating what circumstances are essential and indispensable to the implication of such promise. It is there said, following the language of the court in *Van Valkinburgh v. Watson*, that "in general, a parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent."

The learned Ch. J. Richardson then continues as follows: "But in order to authorize any person to act for the parent in such a case, there must be a clear and palpable omission of duty in that respect on the part of the parent."

If by the use of these terms the learned chief justice intended to say that the law implies a promise from such a "palpable omission of duty" as is evinced by an absolute refusal, deliberately expressed, to provide for the necessities of his minor children, we should not be able to assent to such a declaration. On the contrary, to use the language of Parsons, C. J., in *Whiting v. Sullivan*, 7 Mass. 109, "as the law will not generally imply a promise where there is an express promise, so the law will not imply a promise of any person against his own express declaration; because such declaration is repugnant to any implication of a promise."

But this proposition must be taken with the qualification that where a legal duty — not a mere moral obligation — is imposed upon the party making the negative declaration, the law, (by force of an indispensable fiction), will imply a promise, even against the party's strongest protestations; as in the case of taxes, or the claims of a town, founded on the statute, for reimbursement for relieving paupers. "In the civil law, those contracts, which correspond to the implied contracts of the common law, are denominated *obligationes quasi ex contractu*, and Heineccius denies that they are founded on contract." See Metcalf on Contracts, 5, 8, 167. See Pot. Obl. 115.

In the case of *Pidgin v. Cram*, there was held to be no liability; and the verdict for the plaintiff was set aside upon grounds thus stated by the court: "Here the daughter was nearly of the age of

fifteen, and was residing with her mother when the articles were furnished. She may have been capable of furnishing herself with every necessary, by her own exertions. It does not appear that any application was ever made to the defendant for any assistance. For aught that appears he may have been ready and willing to furnish all that was wanted. The evidence in this case was not, then, sufficient to entitle the plaintiff to a verdict for the supplies furnished to the daughter."

To the same effect is *Townsend v. Burnham*, 22 N. H. 277.

In *Farmington v. Fones*, Perley, C. J., says: "It does not appear that the support was furnished at the defendant's request, or that he has made any express promise to pay. The plaintiff must rely upon a promise implied in law from the facts stated in the report of the auditor." The claim in that case was for support furnished the defendant's daughter while sick with the small-pox and detained in the house where she was visiting, the same being established as a pest-house by the officers of the town; and it was held that the facts were not such as to raise the implication of a promise to pay.

Now, although one of the earlier cases in this state, *Hillsborough v. Deering*, 4 N. H. 86, declares (erroneously as we think) the obligation of parents to support their children to be a requirement of the common law, independent of any statute; it is not apparent that any attempt has ever been made to enforce such obligation, otherwise than upon the ground of a contract or promise on the part of the parent sought to be charged, nor has it ever been claimed that mere moral obligation or duty raises any implication of a promise or contract.

In *French v. Benton*, 44 N. H. 30, Bellows, J., remarks (concerning the assumption of the plaintiff's counsel, in the argument of that cause, that the father by a palpable omission of duty, such as turning the child out of doors and refusing to provide for him, enables the child to pledge his father's credit for necessities) that "there is much conflict of the authorities, but the settled doctrine of the English courts now seems to be that the moral obligation of the parent to support his minor child imposes no obligation to pay his debts, unless he has given him authority to incur them, and that the contract of the father must be proved, just in the same manner as if he were a brother, son, or stranger."

"The early New York cases held that a clear and palpable omission of duty by the parent would give the child credit and render the parent liable for necessities," citing *Van Valkinburgh v. Watson* and other cases. "In the later case of *Raymond v. Loyl*, 10 Barb. 483, the cases sustaining this doctrine are examined and questioned,

and the conclusion finally reached that there is no legal obligation to maintain a minor son, independent of statute." And he continues as follows: "Without undertaking to decide what is the law of New Hampshire, it is quite evident that the tendency of the modern authorities is to limit the liability of the parent for necessities to cases where they are furnished at his request, express, or to be inferred by a jury from circumstances, upon the general ground as stated in *Brainbridge v. Pickering*, 2 W. Black. 1325, that no one shall take it 'upon him to dictate to a parent what clothing a child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother.' A similar tendency exists in respect to promises founded upon the consideration of moral obligations; and it may now be considered as settled that such considerations will not be regarded as sufficient, unless a valid legal obligation had once existed, although afterward barred by some statute or positive rule of law."

On the whole, the principles of law applicable to this class of cases seem to take the form of these propositions: That a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon a promise to pay for them, and that such promise is not to be implied from mere moral obligation, nor from the statutes providing for the reimbursement of towns; but the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law.

In accordance with these principles, it will be for the jury to say, in a given case, whether all the facts and circumstances warrant the finding of a promise, express or implied.

In reaching a result they will be at liberty, of course, and will be likely to take into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of his child, and the weight and controlling influence of all the evidence, governed by the rules of law as we have endeavored to promulgate them, will undoubtedly seldom fail to result in substantial justice and equity.

Let us then apply these considerations to the case before us. It is quite apparent, from the conduct of the minor with regard to the articles purchased, that a large proportion of them were in no sense necessary for the comfort, support or convenience of the minor at the time they were purchased. The fur collar, the kid gloves, the rubber shoes, the boots and the trousers were all made "objects of trade" by the young man, and the suit of clothes, he says, he did not need.

The inference from the statement of the case is that these articles were all deducted from the plaintiff's account and that the balance for which the verdict was rendered consisted of actual necessities. But there was no express promise by the father to pay for them, and we are unable, from the facts and circumstances disclosed, to raise any implication of a promise from any clear and palpable omission of duty on the part of the parent.

Indeed, the verdict of the court is not placed upon any such grounds but only upon these, namely: That the father had sufficient means to yield support to his son when he gave him his time, that he was bound to have furnished him a better education, or more parental care than the son has received, and before he was turned adrift upon the world. And for this failure of duty, which the law properly imposes upon all parents of his ability, the defendant is justly bound to pay the balance of the plaintiff's account."

We cannot regard these considerations as sufficient to warrant the finding of the court. They may in special instances be worthy of application in the forum of conscience, but we think they cannot be adopted in general practice nor admitted in this particular case. To make the father's liability dependent upon no other conditions than those which are said to be a sufficient foundation for the verdict of the court in this case, would be to expose the parent to the ruinous consequences, not only of his son's wasteful extravagance and imprudence, but also to the arts of designing and unscrupulous tradesmen. To follow on the analogy suggested between this case and that of *Pidgin v. Cram*, before cited: Here the son was seventeen years of age. He was residing with the person whom he had contracted to serve, for wages probably sufficient to pay for all his necessary expenses. This fact, and the fact that he was not discharged by his employer, but left his service without any assignable reason, shows that he was capable of furnishing himself with every necessity, by his own exertions. It does not appear that any application was ever made to the defendant for assistance. For aught that appears, he may have been ready and willing to furnish all that was wanted.

The evidence, was not, then, sufficient to entitle the plaintiff to a verdict for the supplies furnished to the son.

We have paid no attention to the fact that the defendant had "in some form given the young man his time," since the plaintiff was not informed of that fact, and we have not regarded it as material in this case.

Verdict set aside and new trial granted.



VAN VALKINBURGH *v.* WATSON.

13 JOHNS. (N. Y.) 480.—1816.

IN ERROR, on certiorari to a Justice's Court.

The defendants in error brought an action in the court below against the plaintiff in error, for necessities furnished by them to his infant son. On the trial, it appeared that the son of the defendant below came to the store of the plaintiffs below, and purchased a coat for himself; but there was no evidence that it was done with his father's consent. The defendant proved that his son lived in his family, and was comfortably and decently clothed, according to his circumstances. A verdict and judgment were given for the plaintiffs in the court below.

*Per Curiam.* A parent is under a natural obligation to furnish necessities for his infant children; and if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with, at his peril. *Simpson v. Robertson*, 1 Esp. Rep. 17; *Ford v. Fothergill*, Id. 211. In the case of *Bainbridge v. Pickering* (2 Wm. Black. Rep. 1325), Gould, J., says with great propriety, "No man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom; all that must be left to the discretion of the father or mother." Where the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to, the parent. In this case there is no ground to charge the father with any neglect of duty in providing necessities for his child, and the judgment must be reversed.

Judgment reversed.

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<sup>1</sup> For a review of subsequent New York cases on the liability of a parent for necessities supplied to the child, see, *Manning v. Wells* (Supreme Ct. Special Term), 8 Misc. 646 (1894).

"Now, the duty of the child, of sufficient ability to maintain its poor and destitute parents, being an imperfect one, not enforced at the common-law, and the statute having prescribed the manner in which it is to be enforced, and the extent of the penalty, the statute remedy is the only one to be resorted to. This principle was recognized by this court in *Almy v. Harris*, 5 Johns. Rep. 175. Then, the consequence necessarily follows, that no one who has afforded relief to indigent persons, from motives of humanity, or from any other consideration,

## COOPER v. McNAMARA.

92 IA. 243.—1894.

**ACTION** to recover the value of board and the use of a room furnished by the plaintiff to the minor son of defendant. There was a trial by the court on an agreed statement of the facts, and a judgment for plaintiff for the amount of her claim. The defendant appeals. Affirmed.

ROBINSON, J. The cause is submitted in this court on a certificate of the trial judge, which shows facts as follows: The defendant has been married twice, the first time to A. W. Fowler. In April, 1873, she gave birth to a son, who was named Arthur Fowler. In 1886, she was divorced from her husband, and by the decree of divorce she was awarded the custody of the son. Soon after that time, Arthur commenced working for himself, under an agreement with his mother that he should receive all his wages. From that time until November, 1890, he worked continuously, received his wages, and clothed and provided for himself, except that he slept at the home of his mother, and she washed and mended his clothes without compensation, and did not receive any part of his wages. After about the 1st of November, 1890, he worked during a short time for his father. Since that time he has not had continuous employment, but has had the money which he earned, for his own use. He is large and healthy. In March, 1891, his mother, having married again, moved to Sloan, where she has since resided. She has a comfortable home there, and at all times has been willing that Arthur should remain with her, and has been ready to provide for him in a suitable and proper manner. When she moved to Sloan he remained in Sioux City, to obtain work for himself, and continued there until on or about the 21st day of January, 1892. The defendant never agreed to pay his board and expenses when away from her home, nor said that she would be responsible for him in any manner. During that time her son was furnished the use of a room and board by the plaintiff, of the value of \$131.27, for which he has paid only the sum of \$48. The plaintiff had no knowledge that Arthur was working for himself and collecting his wages, and made no inquiry of him nor of anyone else in regard to that matter, but knew, while he was boarding with her, that the defendant resided at Sloan.

It is said by the appellee that *Porter v. Powell*, 79 Iowa, 151, 44 can maintain a suit, as upon an implied contract, against the children of such parents, arising merely from the duty which such child owes to its parents to support them." SPENCER, CH. J. in *Edwards v. Davis*, 16 Johns. (N. Y.), 281, 285.

N. W. Rep. 295, is decisive of this case. The cases are similar in some respects. In each case the minor was away from home with the express or implied consent of the parent, and in each the earnings were controlled by the minor. In neither case did the parent furnish or agree to furnish the minor with means of support, nor had the parent in either case formally emancipated the child, or expressed an intention not to be liable for necessities which might be furnished it. But in the Porter case the minor had a severe attack of a dangerous disease, and required the services of a physician. The occasion was not one which admitted of delay and investigation, nor was it in any proper sense optional with the physician whether he would perform the services required. The dictates of humanity and the necessities of the minor made it the duty of the physician to comply with her request, and render her the services demanded. In deciding the case, it was said that the duty of the parent extended only to the furnishing of necessities; that what are necessities in a given case must be determined by the facts in that case; and that what would be necessary for a child in sickness would not be necessary in health. It was also said, in substance, that the facts did not show an intention on the part of the parent not to be responsible for the support of his child if, in consequence of sickness or accident, she should be unable to support herself. This case does not involve an emergency in which the needs of the minor were great and urgent, requiring immediate attention. We may presume that the son of the defendant was able, if he could obtain employment, to support himself; that he had left home for that purpose, and had been given full control of his earnings. It is the right of the parent, in the exercise of a reasonable discretion, to control the minor, to determine where he shall reside, and what he shall do. It is the duty of the parent to provide his minor child with the necessities of life, and, in the absence of evidence to the contrary, it will be presumed that the minor is subject to the control of the parent, although away from his home, and that the liability of the latter for necessities furnished the minor continues. In this case it is not questioned that the board and room furnished the minor were necessities. So far as is shown, he was under the control of his mother while he was boarding with the plaintiff. His mother was willing to furnish him a home with her; yet, so far as the certificate shows, he may have remained in Sioux City, not only with her consent, but by her desire, to obtain employment and support himself so far as he could do so, and to that extent relieve her of the obligation to furnish him support. The facts certified do not show that the son was emancipated, nor that the defendant had decided not to furnish him further

support. They do not show that he had ever supported himself wholly, nor that the defendant expected him to do so. She really claims exemption from liability in this case on the ground that her son was able to work, was away from home, and controlled his earnings. But it is not the law that the parent is obliged to support a minor child only when he is at home, or is unable to work for his own support, or when his earnings are given to the parent. If, however, the minor refuses to remain at the place of residence his parent has provided for him, and there receive the support to which he is entitled, and, in violation of the wishes and direction of the parent, makes his home elsewhere, a question as to the liability of the parent for the support of the minor child might well arise. But this is not a case of that kind. Nothing contained in the certificate of the judge rebuts the presumption, which the law authorizes from the facts shown, that the liability of the defendant for the support of her son continued while he was boarding with the plaintiff. We conclude that the certificate shows facts which justified the district court in rendering the judgment in question, and it is, therefore, affirmed.

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### MCARTHUR, J., IN *CARNEY v. BARRETT*

4 ORE. 171, 174.—1871.

COMMERCIAL communication with infants has been productive of much litigation, and hence we find abundant authority to guide us to a correct conclusion in the case now in hand.

The evidence shows that after the expiration of the contract between the plaintiff and the defendant, the plaintiff allowed the defendant's minor son, Arthur, to board and lodge at his hotel for a period of twelve weeks, notwithstanding the defendant informed him that he would not be responsible for said son's board and lodging, and the plaintiff, assuming the legal liability of the defendant therefor, seeks to recover reasonable compensation for the entertainment furnished.

In general, a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority is proved or the circumstances be sufficient to imply one. *Varney v. Young*, 11 Vermont, 258; *Hunt v. Thompson*, 3 Scammon, 179; *Angel v. McLellan*, 16 Mass. 28; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Owen v. White*, 5 Porter, 435; *Gordon v. Potter*, 17 Vermont, 350; *Raymond v. Loyl*, 10 Barbour, 483.

Actual authority is not claimed, but it is urged that the circum-



stances of the case raise the implication of the defendant's liability for the necessities furnished.

The most favorable construction for the plaintiff that can be put upon the testimony flatly negatives any such implication.

### GILLEY *v.* GILLEY.

79 ME. 292.—1887.

VIRGIN, J. Assumpsit by the mother against the father for their young children's necessary support furnished after a divorce *a vinculo* decreed to her for his "desertion and failure to support," he having been absent from the state several years prior to the decree and never having returned or furnished any support whatever during the time, and no decree for alimony or custody of the children having been made.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support and educate them during infancy and early youth, and it continues until their maturity, when the law determines that they are capable of providing for themselves. *Benson v. Remington*, 2 Mass. 113; *Dawes v. Howard*, 4 Mass. 98; *Nightingale v. Withington*, 15 Mass. 274; *State v. Smith*, 6 Me. 462, 464; *Dennis v. Clark*, 2 Cush. 352-3; *Reynolds v. Sweetser*, 15 Gray, 80; *Garland v. Dover*, 19 Me. 441; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Furman v. Van Sise*, 56 N. Y. 435, 439, 445, 446; 2 Kent's Com. \*190 *et seq.*; Schoul. Dom. Rel. 321.

In *Dennis v. Clark*, *supra*, the court said: "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law and by the common law of England to support and provide for his wife. And if a husband desert his wife or wrongfully expel her from his house and make no provision for her support, one who furnishes her with necessary supplies may compel the husband by an action at law to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." This upon the ground of agency. *Reynolds v. Sweetser*, *supra*; *Hall v. Weir*, 1 Allen, 261; *Camerlin v. Palmer Co.*, 10 Allen, 539. But a minor, who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account even for necessities.

*Weeks v. Merrow*, 40 Me. 151; *Angel v. McLellan*, 1 Mass. 27. Otherwise a child impatient of parental control while in his minority, would be encouraged to resist the reasonable control of his father and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint. *White v. Henry*, 24 Me. 533.

Moreover, in actions for seduction, whereof loss of service is the technical foundation, the loss need not be proved, but will be presumed in favor of the father who has not parted with his right to reclaim his minor daughter's service, although she is temporarily employed elsewhere. *Emery v. Gowen*, 4 Me. 33. "And this rule results from the legal obligation imposed upon him to provide for her support and education, which gives him the right to the profits of her labor." *Blanchard v. Illey*, 120 Mass. 489; *Kennedy v. Shea*, 110 Mass. 147; *Emery v. Gowen*, *supra*; *Furman v. Van Sise*, 56 N. Y. 435, 444.

So, also, in that large class of cases wherein needed supplies, furnished by the town to minor children between whom and their father, though they lived apart, the parental and filial relations still subsisted, are considered in law supplies indirectly furnished the father — the reason is because he was bound in law to support them. *Garland v. Dover*, 19 Me. 441.

We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child, and that in the absence of any contract on the part of the father, he cannot be held except under the pauper laws of those states which are substantially like our own. *Kelley v. Davis*, 49 N. H. 187; *Gordon v. Potter*, 17 Vt. 348.

But as before seen, the law was settled otherwise in this state before the separation and has been frequently recognized in both states since; and we deem it the more consistent and humane doctrine.

It is also settled that at least during the life of the father, the mother, in the absence of any statutory provision, or decree relating thereto, not being entitled to the services of their minor children, is not bound by law to support them. *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Mass. 97; 2 Kent's Com. \*192; *Weeks v. Merrow*, 40 Me. 151; *Gray v. Durland*, 50 Barb. 100; *Furman v. Van Sise*, *supra*, both opinions. R. S. c. 59, sec. 24.

This leads to an inquiry into the effect of the divorce *a vinculo* alone, unaccompanied by any decree committing the custody of the children to the mother. For when such a decree is made then the father would have no right, either to take them into his custody and

support them or employ any one else to do so, without the consent of the mother. *Hancock v. Merrick*, 10 Cush. 41; *Brow v. Brightman*, 136 Mass. 187; *Finch v. Finch*, 22 Conn. 410. Although it is held otherwise in some jurisdictions. *Holt v. Holt*, 42 Ark. 495, and other cases on plaintiff's brief.

But a decree of custody to the mother is predicated of its primarily belonging by right to the father, and the granting of it implies that such action on the part of the court is absolutely essential to imposing upon her the legal obligation of supporting their minor children. So long as the father lives, the mother, in the absence of any decree of custody in her behalf, cannot of right claim, as against him, their services, provided he is a suitable person to have the care of them. He may on *habeas corpus* obtain custody as against their mother, on satisfying the court that he is a fit custodian. *Com. v. Briggs*, 16 Pick. 203.

It would seem to follow that the divorce alone, while it dissolved the matrimonial relation between the parties thereto, did not affect in anywise the parental relation between them and their children. When the divorce was decreed in behalf of his wife the defendant thereupon ceased to be her husband, but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him.

The cases which hold that in case of a decree for custody, the father is not holden, impliedly hold that in the absence of any such decree, he is liable. *Brow v. Brightman*, *supra*.

When the bond of matrimony was dissolved, these parties became as good as strangers; and the plaintiff may then maintain an action against the defendant for any cause of action which at least subsequently accrued. *Carlton v. Carlton*, 72 Me. 115; *Webster v. Webster*, 58 Maine, 139.

We are of opinion, therefore, that this action is maintainable on the implied promise of the defendant resulting from the circumstances and the law applicable thereto.

Exceptions overruled.<sup>1</sup>

<sup>1</sup> In *Ramsey v. Ramsey*, 121 Ind. 215, the mother sought to recover from the father for the support of their child, born after the absolute divorce of the parties. The decree had not provided for the future custody and support of the child, and the child had remained in the custody of the mother. It was held that the claim of the mother for necessities supplied to the child, after the divorce, must be governed by the same rule that would apply in that jurisdiction to a stranger, and that therefore she could not recover unless there were an express or implied promise to pay by the father. See, also, *Pretzinger v. Pretzinger*, 45 Oh. 452; *Fulton v. Fulton*, 52 Oh. 229; *Zilly v. Dunwiddie*, 98 Wis. 428.

## WATTS v. STEELE.

19 ALA. 656.—1851.

CHILTON, J. The question in this case is, whether a father who, by reason of his poverty and bodily infirmity, has become unable to support his infant daughter, has a right to resort to the court of equity which has appointed a trustee for the estate of the daughter, to have an allowance for her support and education decreed to be paid by such trustee out of the yearly income of her estate. The bill is filed by the father, with whom the daughter lives (the mother being dead), against the trustee. The chancellor dismissed the bill.

We are unable to see any reason why the court should repudiate this jurisdiction over the infant and her estate. There is nothing in the nature of the settlement by which the property was secured to the mother of the daughter, forbidding an allowance for maintenance. The ward has an absolute interest, and the rule is, that where funds are thus situated, the court will allow maintenance in the absence of any direction to that effect, and even in disregard of a direction for accumulation; and if an insufficient sum is given for maintenance, the court will increase it. McPher. on Inf. 241.

As it is the duty of the father to maintain his child when he can do so, he is held liable to account as guardian for the profits of the child's estate which come to his possession during the child's minority. Such being his duty, the courts of chancery originally refused to allow any reimbursements to the father for past maintenance. *Hughes v. Hughes*, 1 Bro. C. C. 387; 2 Id. 231; 3 Id. 60; *Reeves v. Prymer*, 6 Ves. 424; McP. on Inf. 247, where the cases are collated. But it is said that in special cases the court may direct an inquiry in favor of the father for past maintenance. He cannot insist on it as a matter of course. *Ex parte Bond*, 2 M. & K. 439.

The case before us is for future maintenance and education of the daughter. There can be no question as to the jurisdiction of the chancellor in setting apart a fund for this purpose out of the income of the daughter's estate, if the father be unable to provide for her. When the father is utterly unable to support his children, the law would be inhuman in the extreme to cast them upon the charity of strangers for support, while their own property is adequate for their maintenance. But such provision does not depend upon the father's insolvency only, but it is made whenever he is unable to give the child an education suited to the fortune which she enjoys or expects. *Buckworth v. Buckworth*, 1 Cox, 80, cited in McPh. on Inf. 220. It is said the father's ability is to be estimated comparatively.



The amount of his income, the size of his family dependent on him for support, and we might add, his physical inability from disease, etc., to exert himself in providing for them, should be taken into the estimate; and if, in view of the circumstances, it should appear to be reasonable to make an allowance, and for the benefit of the infant, the court should order it. And to this end, it is proper that the question of the ability of the father, the amount of the ward's income, and the sum required for her support and education, should be referred to the master, if the chancellor is in doubt upon these questions, so that the proper allowance can be made.

We do not think there is any valid objection on the score of parties. The father is a party interested in being provided as the guardian by nature and nurture, with the means of supporting and educating his child, and is certainly the proper person to superintend her education, unless there be objections to him, and none are pretended to exist in the present case. The trustee who holds the property represents the ward in respect to that. It is not indispensable that the child should be made a party. The court will see to it that her interest is not prejudiced. We find a similar application was heard at the suit of the mother, and a liberal allowance made, in South Carolina (*Mrs. Heyward v. Cuthbert, Ex'r of Heyward*, 4 Des. Eq. R. 445), and the principle seems to be sanctioned by several authorities in the brief of counsel.

Let the decree be reversed and the cause remanded.

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### *Earnings and Emancipation of the Child.*

#### BISHOP *v.* SHEPHERD.

23 PICK (MASS.), 492.—1839.

ASSUMPSIT for the services of Robert Bishop, the plaintiff's minor son, on board the whale ship *Ann Alexander*, of New Bedford, of which the defendant was master.

At the trial, before Putnam, J., it appeared that the minor, being in the plaintiff's service, and living with him, was without his consent or knowledge, received on board the ship; that the son signed the shipping articles; that the defendant knew that he was under twenty-one years of age, but was probably deceived by a false representation that he had his father's consent to his shipment; that he performed his duty as one of the crew, for more than three years; that he left the ship at Talcahuana, on her return voyage; and that

there was a balance due to him, provided his leaving the ship did not amount to a forfeiture thereof.

The jury found that the minor deserted the ship at Talcahuana without intending to return, and that he was not justified in so doing by any ill-usage or danger of life or limb. This was received by the judge as a verdict for the defendant.

The plaintiff moved the court that the verdict should be set aside and a new trial granted.

SHAW, C. J. This is an action brought by the plaintiff to recover the wages or earnings of his minor son, for services on board of a whale ship. It was found by the jury, that the son deserted in the course of the voyage, without any excuse or justification, on the ground of cruel treatment. By the shipping articles, such a desertion is declared to be a cause of forfeiture, and if the son were acting *suo jure* under and by force of the contract, it is alleged that his share would be forfeited, and that the father is bound by the same forfeiture; or, by the general rule of the maritime law, which declares that all claims for wages are forfeited by desertion.

But we think it hardly necessary to inquire what would be the rights, either of the seaman himself or of the father, were either of them claiming upon the express contract. In the late case of *Vent v. Osgood*, 19 Pick. 572, in Essex, it was held, that such a contract by a minor was voidable, that he might avoid it during the voyage by quitting the ship, that being rendered void *ab initio*, but he was not bound by the clause of forfeiture, and might recover a *quantum meruit* for his actual services. But the plaintiff claims a reasonable compensation, on the ground that he is entitled to the earnings and services of his son, the value of which he is entitled to recover as upon an implied contract; and the question is, if he has such remedy, whether it is against the master or the owners. He is not to be affected by the shipping paper, because it is an express contract, which, as against him and his rights, the son had no authority to make. The action of the father can only be maintained, as upon an implied contract, founded upon the equitable consideration that the father was entitled to the earnings and services of his son, that the defendant received those earnings, and had those services, and is bound to account therefor to the plaintiff, and for this duty the law raises an implied promise. That the plaintiff was entitled to the earnings of his son, sufficiently appears by the facts, that the son was a minor under his tutelage, and in his employment, and engaged in this voyage without his consent. As he disaffirms the son's contract, and claims the value of the services, as a debt due directly to himself, he

is not bound by its terms, nor affected by its conditions. \* \* \* This decision goes on the ground, that the father disaffirms the express contract, and sues on an implied promise to pay what he is equitably entitled to have, and that as the owners held the proceeds of the son's earnings, they, and not the master, must be responsible, on an implied promise to the father.<sup>1</sup>

### CLOUD *v.* HAMILTON.

11 HUMPH. (TENN.) 104.—1850.

THIS action of assumpsit was brought in the Circuit Court of Meigs county; it was submitted to a jury on the plea of non-assumpsit under the direction of Judge Keith, and a verdict and judgment rendered for the defendant.

The plaintiff appealed.

TOTTEN, J. The action is assumpsit on the common counts for labor and services; and the case is, that the plaintiff's son William, at about the age of seventeen years, went into the service of Robert W. Hamilton, a tanner, with a parol understanding between him and William, that William should reside with him for some three years, and learn the business and art of tanning. William went, at first, without his father's consent, but the proof shows that he afterwards consented to William's continuing in Hamilton's service, upon their own agreement, but declined to become a party to any contract between William and Hamilton, or to have any interest in it. William remained with Hamilton about a year and a half, principally engaged in the tanyard, when he quit Hamilton's service, on some disagreement between them, and thereon the plaintiff instituted this suit to recover for his son's labor and services. The court charged, in effect, that the plaintiff might recover for the labor and service of his son, if he went and continued in defendant's employment without the consent of the plaintiff, but could not recover if he consented that his

<sup>1</sup> "The clear presumption is that the father is entitled to the earnings of his son until the latter arrives at the age of twenty-one years; and if he continues thereafter to remain with his father as a member of his family, the presumption is, that his labor is gratuitous. He may, however, show the contrary. The ground of such presumption is, that the son received from the father parental support, protection, education, clothing, and like suitable provisions, and his labor is, hence, due and belongs to the father, unless the contrary be shown. *Dodson v. McAdams*, 96 N. C. 149; *Young v. Herman*, 97 Id. 280, and the authorities cited in these cases; *Winchester v. Reid*, 8 Jones, 377." — MERRIMON, C. J., in *Grant v. Grant*, 109 N. C. 710, 713.

son might act in that matter upon his own agreement, and for his own benefit. It is unquestionably true, that the father being under obligation to maintain, and in some degree, to educate his infant children, is entitled to the custody of their persons and to the value of their labor and services. If the infant do labor and service for another, without the father's consent, such person will be liable therefor, at the suit of the father. But the father may waive this right for the benefit of his child, and permit him to act for himself, upon his own rights and responsibilities and for his own benefit, and this waiver may appear by express agreement, or be implied from facts and circumstances. If he waive his rights, and permit his son to make contracts and acquisitions for himself, they are his contracts and acquisitions, and not the father's. See *Burlingame v. Burlingame*, 7 Cowen Rep. 92, *McCoy v. Huffman*, 8 Cowen Rep. 84; *Shute v. Door*, 5 Wend. Rep. 204, 2 Kent Com. 194, note.

The question whether the plaintiff had thus waived his rights was fairly left to the jury, and we think that they have decided it correctly.

The plaintiff having waived his right in this respect, it is not material to determine the legal effect of the agreement entered into by his son with defendant's intestate.

We do not think, in view of the facts of this case, that the plaintiff has any cause of action against the defendant.

Let the judgment be affirmed.<sup>1</sup>

## COMMONWEALTH v. GRAHAM.

157 MASS. 73.—1892.

FIELD, C. J. \* \* \* The real question is whether, when a minor son marries without the consent of his father, and the father never consents to it, and needs the son's wages for his support and the support of his family, the father is entitled to the son's wages during minority in preference to the wife, who also needs the wages for her support. The ruling was that the "wife would be entitled to receive support from" her husband, and that he "would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest."

It seems to be settled that the marriage of a minor son, with the consent of his father, works an emancipation, and it is not clear that the marriage of a minor son without his father's consent does not

<sup>1</sup> See, also, *Clay v. Shirley*, 23 Atl. Rep. 521 (N. H. Supreme Court, 1874); *Nicolaus v. Snyder*, 56 Neb. 531.



have the same effect, although the decision in *White v. Henry*, 24 Maine, 531, is *contra*. It has been said: "The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, his labor, earnings and conduct." *Sherburne v. Hartland*, 37 Vt. 528, 529. There seems to be little doubt that, when an infant daughter marries, she is emancipated from the control of her parents. *Aldrich v. Bennett*, 63 N. H. 415; *Burr v. Wilson*, 18 Tex. 367; *Porch v. Fries*, 3 C. E. Green, 204; *Northfield v. Brookfield*, 50 Vt. 62; *Rex v. Wilmington*, 5 B. & Ald. 525; *Rex v. Everton*, 1 East, 526. See, however, *Babin v. La Blanc*, 12 La. Ann. 367. The meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings. In *Taunton v. Plymouth*, 15 Mass. 203, 204, it was intimated that the marriage of an infant son with the consent of the father entitled the son to his own earnings for the support of his family, and in *Davis v. Caldwell*, 12 Cush. 512, it is said that an infant husband is liable for necessities furnished for himself and his family. It is clear, we think, that it is the duty of an infant husband to support his wife, and that, if he have property and a guardian, it is the duty of the guardian to apply the income, and, so far as is necessary, the principal of his ward's property, to the maintenance of the ward and his family, under the Pub. Sts. c. 139, sec. 30.

We are of the opinion that these considerations make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent, and that the ruling of the court was sufficiently favorable to the defendant. Whether sound policy does not require that, in every case in which the marriage is valid, an infant husband should be entitled to all his earnings, need not now be decided.

Exceptions overruled.

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### WILSON v. McMILLAN.

62 GA. 16.—1878.

BLECKLEY, J. The record discloses that the daughter was a minor, but does not give her exact age. It shows that the father and daughter made a contract in the commencement of the year 1876, by which it was agreed that she was to receive for her labor in the crop of that year all the cotton that might be produced; that she worked on the father's farm with him and helped to cultivate it;

that the area planted in corn was thirteen or fourteen acres, and that planted in cotton was five acres; that two bales of cotton were produced; that one of these was sold by him, the proceeds of which he kept, and the other was levied upon by virtue of a judgment against him, rendered in the previous year, that is, the year 1875; that on the faith of her contract with her father, she opened an account with a merchant, and from time to time, between January and October, purchased supplies and merchandise, some for herself and some for the family, expecting and promising to make payment out of the cotton or its proceeds; that if the cotton should be sold away from her this debt would be left unpaid and unprovided for; that the contract between her and her father was brought about by a threat on her part to leave him, as the other children had done; and that to the bale of cotton levied upon as above mentioned she interposed her claim, which claim was decided by the presiding justice of the peace in her favor.

1. In section 1792, the Code declares, "until majority, the child remains under the control of the father, who is entitled to his services and the proceeds of his labor." The same section provides that this parental power is lost, "by his consent to the child's receiving the proceeds of his own labor, which consent shall be revocable at any time." Other modes of losing it are enumerated, but they are irrelevant. In his excellent work on Master and Servant, sec. 25, Mr. Wood says: "It seems that emancipation may be implied even when the minor resides at home and works for his father, from a promise on the part of the father to pay him for his services during his minority, so that the minor may maintain an action against the father even for such services." 44 N. H. 293; 12 Mass. 377; 5 Eng. 211. No doubt the agreement would have to be clearly established. 64 Pa. St. 480. As to the rights of the father's creditors, they would seem to be no more absolute over the prospective labor of the child than over that of the father himself. Certainly a debtor may work gratuitously for whom he pleases, and his creditor cannot oblige him to exact wages. While a debtor cannot give away his property to the prejudice of his creditors, he may give away his labor. So, too, may he give away his minor child's labor, either to the child itself or to another. A father is not bound to claim the earnings of his child and appropriate them to his creditors. 3 Casey, 220. Of course he cannot take the earnings in fact and cover them up against the claim of his creditors by a mere colorable arrangement with the child. But it is not apparent why a *bona fide* hiring of the child by him before the labor is performed is not as valid a mode of waiving parental right as any other. The good faith of the transaction is open to scrutiny, and is for decision by the tribunal trying the fact. A reasonable part of the pros-

pective crop, in a fair and honest contract, may be promised the child at the time of the hiring, as compensation; and such part, when it comes into existence, will be the property of the child, and not liable to seizure to satisfy the father's debts. In the present case, the judgment was older than the contract of hiring, but as the hiring took place before the crop was planted, and therefore before the judgment lien could attach, and as there is no certainty that, but for the contract and the labor done in pursuance of it, the cotton levied upon would ever have been produced, we think the date of the judgment makes no difference. When a laborer hired to plant and cultivate a crop is to receive a definite part of the crop as wages, as all the cotton, or all the corn, the hirer never has any real, substantial ownership of such part as against the laborer, provided the contract of labor is fully and faithfully performed. Grant that the father could have defeated the daughter's right by revoking his consent as given in the contract of hiring, still he did not, in point of fact, revoke his consent as to the one bale levied upon, if he did as to the other. His creditor could not revoke for him, and without revocation the daughter's would be and remain the superior right.

2. Fraud, indeed, would break up the daughter's title, but the magistrate, we may assume, found no fraud; and the evidence is not such as to force him to find fraud.

Judgment affirmed.<sup>1</sup>

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### *Property of the Child.*

#### BANKS *v.* CONANT.

14 ALLEN (MASS.) 497.—1867.

CONTRACT for money had and received. The plaintiff, who was the father of Joseph Banks, sued the defendant to recover \$125, bounty money, which was due to Joseph for enlisting in the United States service, but which, unknown to Joseph, had been paid to the defendant, who had assisted him to enlist.

BIGELOW, C. J. In consideration of the duty which the law imposes on a father to furnish adequate support to his child during infancy, the services of the child during that period are due to the father, and, if they are rendered to a third person, the right of the father to recover the value thereof is clear and indisputable. But

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<sup>1</sup> But see *Godfrey v. Hays*, 6 Ala. 501.

this is the extent of the father's right. He has no title to the property of the child, nor is the capacity or right of the latter to take property or receive money by grant, gift or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever, therefore, an infant acquires which does not come to him as a compensation for services rendered, belongs absolutely to him, and his father cannot interpose any claim to it, either as against the child, or as against third persons who claim title or possession from or under the infant.

These familiar principles are decisive against the right of the plaintiff to maintain this action. The money which the defendant received was not paid for any services which the plaintiff's minor son had rendered or had agreed to render. His pay as an enlisted soldier was a definite and fixed sum each month, given and received as an adequate compensation for the time and labor which it was his duty to render in the military service of the United States. But the money which is the subject of this action was paid for a very different purpose. It was a bounty or gratuity given to the recruit for the purpose of inducing him personally to undertake a service of an arduous and hazardous nature, into which his father had no power or authority to compel him to enter, and which the minor was under no legal obligation to assume. The consideration of the payment was solely the assent of the minor to the agreement or contract of enlistment by which he was bound to render the prescribed service or duty. The decisive test of this is that his right to the bounty was complete and irrevocable, although he might not have been able, by reason of injury, illness, sudden death or other cause, to perform any duty to render any substantial service under the contract into which he had been induced to enter by reason of the bounty. The money was not paid as an equivalent for services, and, as these are the sole foundation on which the claim of the father rests, it necessarily follows that the latter shows no title to the money, in the hands of the defendant, which is sought to be recovered in this action. It has been held in England that money due to apprentices for bounties or prize money, to which they become entitled while in the naval service, cannot be recovered by their masters. *Carson v. Watts*, 3 Doug. 350; *Eades v. Vandeput*, 4 Doug. 1.

Judgment for the defendant.<sup>1</sup>

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<sup>1</sup> That the soldier may maintain an action for money had and received in such case, see *Sullivan v. Fitzgerald*, 12 Allen, 482.



*Chastisement and Restraint of the Child.*

## FLETCHER ET AL. v. THE PEOPLE.

52 ILL. 395.—1869.

MR. JUSTICE LAWRENCE. This was an indictment against Samuel Fletcher and his wife, Leticia, for false imprisonment of Samuel Fletcher, Jr., the son of Samuel, Sr., and stepson of Leticia. The defendants were found guilty, and sentenced to pay a fine of \$300 each.

The instructions gave the law correctly to the jury, and, so far as relates to Samuel Fletcher, we are of opinion the evidence sustains the verdict. It shows the wanton imprisonment, without a pretense of reasonable cause, of a blind and helpless boy, in a cold and damp cellar, without fire, during several days of mid-winter. The boy finally escaped and seems to have been taken in charge by the town authorities. The only excuse given by the father to one of the witnesses who remonstrated with him was, that the boy was covered with vermin, and for this the father anointed his body with kerosene. If the boy was in this wretched state, it must have been because he had received no care from those who should have given it. In view of this blind and helpless condition the case altogether is one of shocking inhumanity.

Counsel urge that the law gives parents a large discretion in the exercise of authority over their children. This is true, but this authority must be exercised within the bounds of reason and humanity. If the parent commits wanton and needless cruelty upon his child, either by imprisonment of this character or by inhuman beating, the law will punish him. Thus, in *Fohnson v. The State*, 2 Humph. 283, the court held the parents subject to indictment, because, in chastising their child, they had exceeded the bounds of reason, and inflicted a barbarous punishment. It would be monstrous to hold that under the pretence of sustaining parental authority, children must be left, without the protection of the law, at the mercy of depraved men or women, with liberty to inflict any species of barbarity short of the actual taking of life.

In this case, however, the verdict against Leticia Fletcher was wrong. There is absolutely no evidence whatever against her. As to her, the judgment must be reversed. As to Samuel Fletcher, it is affirmed.

A similar order of partial reversal in a criminal case was entered by this court in *Vandermark v. The People*, 47 Ill. 124.

Reversed in part.<sup>1</sup>

<sup>1</sup> For a case in which violent treatment was held justified, see *State v. Jones*, 95 N. C. 588.

MCKELVEY *v.* MCKELVEY ET AL.

111 Tenn. 388. — 1903.

BEARD, C. J. This is a suit instituted by a minor child, by next friend, against her father and stepmother, seeking to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the latter at the instance and with the consent of the father. Upon demurrer the suit was dismissed, and, the case being properly brought to this court, error is assigned upon this action of the trial judge.

We think there was no error in this dismissal. At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by gross misconduct on his part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such case was to be found in an appeal to the criminal law and in the remedy furnished by the writ of *habeas corpus*. So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts. It is true that no less celebrated an authority than Judge Cooley, in the second edition of his work on Torts, at page 171, observes that "in principle there seems to be no reason it should not be sustained." No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of *Hewlett v. George, Ex'r*, reported in 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. It is there said: "So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and of a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor children protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

The fact that the cruel treatment in this case was inflicted by a stepmother can make no difference, for, whether inflicted in the presence of the father or not, if the action could be maintained at all, he would be responsible for the tort. If inflicted in his presence, he alone would be responsible, nothing appearing to repel the presumption that it was the result of his coercion; if out of his presence, then he and she would be jointly liable for the wrong. So at last it comes back to the question as to the right of a minor child to institute a civil action against the father for wrongs inflicted upon it.

An analogy is furnished in the relation of husband and wife. It has been held that neither husband nor wife can maintain an action against the other for wrongs committed during coverture. This holding rests in part upon their unity by virtue of the marriage relation, which would preclude the one from suing the other at law, and in part upon the respective rights and duties involved in that relation. In *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, it was held that a wife could not, even after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture, nor against persons who assisted him in making the assault. As was said by the court, at common law the husband was the guardian of the wife, and was bound to protect and maintain her, and on that ground "the law gave him a reasonable superiority and control over her person, authorizing him to put gentle restraints upon her liberty if her conduct were such as to require it." 2 Kent's Com. 180. In view of the evolution of the law in the amelioration of the married woman's condition and the comparative independence that was now secured to her, it was insisted in that case that the action should be maintained. To this, however, the court replied: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically the married woman has remedy enough. She has the privilege of the writ of *habeas corpus* if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce."

In *Phillips v. Barnett*, First Q. B. D. 436, the same rule is announced, although it was insisted there, as in the case from Maine, that, the marriage relation having ceased by divorce, the wife should be let in to her action for damages against the former husband for personal injuries inflicted upon her during coverture; the argument being that the relation simply suspended the right of action, and, this relation having been terminated, the right was then in a condition to be enforced. But it was there said, as in the first case, that the error in this insistence was in supposing that a right of action

ever existed; that there was no civil remedy either during or after coverture, because there was no civil right to be redressed.

We think that the circuit judge acted in obedience to a well-settled rule controlling the relation of father and child, and in furtherance of a sound public policy, in sustaining the demurrer to the declaration in this case, and his judgment is affirmed.



*Torts by the Child.*PAUL *v.* HUMMEL.

43 Mo. 119.—1868.

PLAINTIFF sued defendant for damages, in the sum of two thousand dollars, for injury to her minor son, aged six years, received at the hands of a minor son of defendant, aged eleven years, who was residing with, and under the charge and control of, his father, the said defendant.

The defendant demurred, on the ground that a father is not responsible for injuries caused by an assault made by his minor child.

The demurrer was sustained by the court below.

WAGNER, J. In *Baker v. Haldeman*, 24 Mo. 219, it was decided by this court that a father was not responsible for injuries caused by an assault made by his minor child. But an attempt is made to evade that decision, or at least to exclude this case from its reasoning, by averring in the petition that the child of the defendant, who caused the injury, was dangerous to the plaintiff and her children, by reason of his vicious and destructive temper and of his sudden and causeless fits of anger, and that defendant had notice of that fact. It is not averred that defendant sanctioned the wrong committed by his minor son, either before or after the act. But the petition was doubtless framed upon the theory that an instruction given in the trial court, in *Baker's* case, was correct law, as that case was not reversed on error. The instruction was that, "unless the plaintiff has established that the boy was of vicious disposition and habits, and that the father knew it at the time, he is not responsible in damages for the injury sustained, and the jury will find for the defendant." The verdict was for the defendant, and the judgment therein was affirmed; but Judge Leonard, in giving the opinion of the court said that, although the instruction given at the instance of the defendant was erroneous, it was not to the plaintiff's prejudice and was therefore not a matter for him to complain of. It will be thus seen that the doctrine contended for derives no support or authority from that case. In *Tift v. Tift*, 4 Denio, 175, the action was brought to recover damages for the killing of a hog, by a dog which was set on by defendant's daughter, but the court held that the defendant was not answerable for the act of his daughter, done in his absence, and without his authority or approval; but the daughter, whether an infant or not, was answerable for her own trespass. A parent cannot be held liable for the willful trespasses and torts of

infant children, when he neither assents to nor ratifies them. When the minor has committed a tort, with force, he is liable at any age to be proceeded against as an adult. Reeves, Dom. Rel. 386; 1 Chit. Pl. 66; *Fennings v. Randall*, 8 T. R. 335; Bacon, Abr. Infancy, H.; *Loop v. Loop*, 1 Verm. 177; *Bullock v. Babcock*, 3 Wend. 391. I know of no principle of law by which the action is maintainable. There is no such relation existing between father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of any other person. The father is not liable for the contracts of the son, within age, except they be for necessities, and it would be a great departure from the law to hold him responsible for the son's trespasses and wrongs.

I think the demurrer was rightfully sustained, and the judgment will be affirmed. The other judges concur.

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#### TAYLOR, J., IN *HOVERSON v. NOKER*.

60 WIS. 511, 513.—1884.

It will be seen by an examination of the record that it became important for the plaintiffs to connect the father with the acts of his young sons, which the plaintiffs allege caused the injury complained of, and for this purpose the plaintiffs offered evidence tending to prove that the sons had frequently, before the day upon which the accident happened, called abusive names, shouted, and frequently discharged fire-arms when persons were passing the house of the defendants, and that this was often done in the presence of their father. All evidence of this kind was excluded. This, we are inclined to hold, was error. If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which, in its nature, was likely to result in damage to those passing, and when an injury did happen from that cause he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made. If he made it himself, with the intention to

frighten passing teams, he would be responsible for the injury caused by it; and when he permits his irresponsible children to do it he is equally liable, because he has the control of his premises as well as of the children, and is bound to restrain them from causing a dangerous thing to be erected on his premises near the highway; and permitting his young sons to become an object of fright to teams passing, is certainly equally, if not more reprehensible than permitting an inanimate structure to be placed where it would cause such fright. We think the evidence ought to have been admitted in order to connect the father with the acts of the young sons which caused the injury when the plaintiffs were on their way to church in the morning, as well as when on their return from the church in the afternoon.<sup>1</sup>

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*Torts to the Child.*

PEPPERCORN *v.* THE CITY OF BLACK RIVER FALLS.

89 Wis. 38.—1894.

THIS action was brought to recover damages for an injury sustained January 13, 1891, by reason of a defective sidewalk in the defendant city, at the place particularly described in the complaint, which contained the usual allegations in such cases. The answer is by way of admissions and denials. At the close of the testimony, the jury returned a general verdict, wherein they found for the plaintiff and assessed her damages at \$935.50, and also returned special findings to the effect (1) that the sum of \$90 will compensate the plaintiff for loss of time from inability to labor from the time of the alleged injury to the time she became of age; (2) that the sum of \$165.50 was paid out or incurred in behalf of the plaintiff for medical attendance and medicines, from the time of the alleged injury to the time she became of age.

CASSODAY, J. The trial court committed no error in refusing to allow the plaintiff compensation for loss of time during her minority from inability to labor by reason of the injury. It does not appear that she was emancipated, and of course her services during that time belonged to her father and not to her. Nor did the court commit any error in refusing to allow her to recover for moneys paid out or incurred by her brother in her behalf for medical attendance and medicines in consequence of such injury. It may be that the physician so in attendance, and the person so furnishing the medicines, respectively, might have recovered therefor as for necessities,

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<sup>1</sup> See also *Taylor v. Seil*, 120 Wis. 32; *Johnson v. Glidden*, 11 S. Dak. 227.

but those things gave her no right of action for moneys voluntarily paid and liabilities voluntarily incurred by her brother or her father. *Taylor v. Hill*, 86 Wis. 105.<sup>1</sup> The result is that the plaintiff can take nothing by her appeal; and, in so far as the judgment is in favor of the defendant in disallowing those two items, the same is affirmed. \* \* \*

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### *Torts to the Parent in the Filial Relation.*

#### HORGAN v. PACIFIC MILLS.

158 MASS. 402.—1893.

TORT for damages for the loss of service of the plaintiff's daughter, a minor, and for labor performed and expenses incurred in the care and cure of her daughter in consequence of injuries received by her through the negligence of the defendant. The writ was dated March 23, 1886.

An action against the same defendant had previously been brought by the daughter for damages for the injuries received by her, and that action had been settled by the parties on October 26, 1885. The defendant appealed to this court.

FIELD, C. J. The plaintiff's daughter when injured was eleven years old, and it appears that she, with her sisters, one older and two younger than herself, lived with their mother, who was a widow, as members of one family, and that the children were dependent for support on the mother, and rendered some service to her "in work about the house and in tending a small shop which was the front room of the tenement in which they lived." In consequence of the injury the plaintiff suffered loss of her daughter's services, and was put to expense in providing medical attendance for her, and to labor and trouble in nursing and taking care of her. The auditor's report has been made an agreed statement of facts, and the exact finding of the auditor on the question of damages is as follows: "By reason of her daughter's injuries the plaintiff incurred an expense of \$10 for help in work about the house while the plaintiff was taking care of her daughter, and rendered personal service in nursing and caring for her daughter which was fairly worth \$50, and paid for medical attendance and treatment of her daughter on account of said injuries \$36, and for expenses properly incurred in going to the Massachusetts General Hospital the sum of \$11.25, and for prescriptions, medicines, etc., the sum of \$20, and by reason of said injury the value of her daughter's services to her was diminished \$100; and I

<sup>1</sup> *Contra, Denver & R. G. R. v. Lorentzen*, 79 Fed. 291; *Brosnan v. Sweetser*, 127 Ind. 1.



find that all said expenses were properly incurred by the plaintiff, who was without means of support other than her own exertions, without any agreement between her and her daughter for repayment thereof, unless such agreement is to be implied by law from the facts herein reported. And that the daughter at the time said expenses were incurred had no property or thing of value, excepting a claim against this defendant for damages suffered by reason of their said negligence, and that this claim was not settled or paid until October 26, 1885, which was after all said expenses were incurred, so that at the time said expenses were incurred the daughter was actually dependent upon the plaintiff for support and care." These sums amount to \$227.25, which the auditor found the plaintiff was entitled to recover, unless the value of the loss of services occurring after the date of the settlement of the daughter's suit should be deducted, which is estimated at \$25.

It appears that the daughter brought suit against this defendant for the injury, and that the suit was settled by the payment of \$2,800, which the plaintiff in the present action received, as guardian of her daughter, having been appointed guardian on September 21, 1885. It is agreed that in this suit by the daughter no claim was made for expenses or loss of services.

The tendency of modern decisions is to give to a widow left with minor children, who keeps the family together and supports herself and them, with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her to the extent of her ability much the same civil responsibility for their education and maintenance as are given to and imposed on a father. We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant. *Dedham v. Natick*, 16 Mass. 135; *Hammond v. Corbett*, 50 N. H. 501; *Matthewson v. Perry*, 37 Conn. 435. See *Dumain v. Gwynne*, 10 Allen, 270; *Camerlin v. Palmer Co.* 10 Allen, 539; *Baldwin v. Foster*, 138 Mass. 449; *Gleason v. Boston*, 144 Mass. 25; *Connell v. Putman*, 58 N. H. 534; *Whitaker v. Warren*, 60 N. H. 20; *County Commissioners v. Hamilton*, 60 Md. 340; *Natchez, Jackson & Columbus Railroad v. Cook*, 63 Miss. 38. Of course there should not be a double recovery, but if the expenses are not incurred on the credit of the child, but on that of the mother, and if the child, while living with the mother, is not en-

titled to its own earnings, so that the loss of service is not the child's loss but the mother's, these items of damage should not be included in the damages recovered by the child, but in those recovered by the mother. See *M'Carthy v. Guild*, 12 Met. 291; *Dennis v. Clark*, 2 Cush. 347; *Wilton v. Middlesex Railroad*, 125 Mass. 130. In the case of a girl eleven years old, whose father is dead and whose mother remains a widow, and who has no property and no guardian, it is wise policy to give the control of her to her mother, and to impose on the mother the ordinary rights and duties of a parent, unless it has been determined otherwise by some tribunal having jurisdiction over the relation of parent and child.

The finding of the court seems to be for the sum found by the auditor, with interest from the date of the writ. This, we think, is correct. It does not appear from the papers that judgment has been entered on this finding, but we assume that this has been done, as the defendant appeals. The entry should be,  
 Judgment on the finding affirmed.

### MULVEHALL *v.* MILLWARD.

11 N. Y. 343.—1854.

THE action was to recover damages for the seduction of the plaintiff's daughter by the defendant.

EDWARDS, J. It was proved upon the trial that the plaintiff's daughter, at the time of her seduction, was in the defendant's service, and it did not appear that there was *animus revertendi*, or that she, in fact, returned to her father's house until after her confinement. Upon this state of facts it was contended upon the part of the defendant that, as no expense or actual loss of service on the part of the plaintiff was proved, he should be nonsuited, and a motion was made to that effect, which was overruled.

In the case of *Dean v. Peel*, 5 East, 45, the plaintiff's daughter, at the time of her seduction, was under age, but was living in the family of another person, in the capacity of a housekeeper, with no intention at the time of her seduction of returning to her father's house, although she did return there while she was under age, in consequence of her seduction, and was maintained by her father. Upon this state of facts it was held, that, as the daughter was actually in the service of another person than her father, and as there was no *animus revertendi*, the action could not be maintained. The rule thus laid down has been since followed in the English courts. *Blay-*

*mire v. Haley*, 6 Mees. & W. 55; *Harris v. Butler*, 2 Id. 539; *Grinnell v. Wells*, 7 Man. & Gran. 1033. In a few years after the decision in *Dean v. Peel*, a somewhat similar case arose in this state, in which it appeared that the plaintiff's daughter, who was under age, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement that she should continue to live in his house for any fixed time. While in her uncle's house she was seduced, and got with child. Immediately afterwards she returned to her father's house, where she was maintained, and the expense of her lying in was paid by him. Upon this state of facts it was held, contrary to the case above cited, that the action could be maintained. In delivering the opinion of the court, Ch. J. Spencer said: "The case of *Dean v. Peel* is against the action. In the present case the father has made no contract binding out his daughter, and the relation of master and servant did exist from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. She was his servant *de jure*, though not *de facto*, at the time of the injury; and being his servant *de jure*, the defendant has done an act which has deprived the father of the daughter's services, and which he might have exacted, but for that injury." *Martin v. Payne*, 9 Johns. 387. This decision was afterwards approved of in *Nickleson v. Stryker*, 10 Johns. 115. In the case of *Clark v. Fitch*, 2 Wend. 459, it was proved upon the trial that the plaintiff told his daughter that she might remain at home, or go out to service, as she pleased, but, if she left his house, she must take care of herself, and he relinquished all claim to her wages and services. It was contended that there was a distinction between this case and that of *Martin v. Payne*, on the ground: 1, That the father had given his daughter her time absolutely; 2, That he had, in fact, incurred no expense; but it was held that this made no difference, and that the personal rights of the father over the child were not relinquished. In the recent case of *Bartley v. Richtmeyer* (4 Coms. 38), Bronson, Ch. J., in giving the opinion of the court, says, that "our cases hold that the relation of master and servant may exist for the purposes of this action, although the daughter was in the service of a third person at the time of her seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure." But it was there held that the stepfather had no such right, and consequently could not maintain the action. In Pennsylvania a similar rule has been adopted. *Hornketh v. Barr*, 8 Serg. & R. 36; 6 Id.

177. See, also, *Mercer v. Walmsley*, 5 Har. & John. 27. And Greenleaf, in his treatise on Evidence, lays it down as the established American rule. 2 Greenl. Ev. sec. 576. Whether it be more or less consistent with principle and policy than the English rule, it is now too late to inquire. It is too well established by authority. The case of *Dain v. Wycoff*, 3 Selden, 191, was cited on the part of the defendant; but it will be seen, by reference to the opinion delivered in that case, that it was decided upon the very distinction which has been laid down in the adjudications referred to. In that case the plaintiff's daughter was bound out to service to another, and the plaintiff had no right to her services.

The judgment should be affirmed.

All the judges, except Ruggles, who did not hear the argument and took no part in the decision, concurred.

Judgment affirmed.

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### *Legitimacy.*

#### HEMMENWAY v. TOWNER & WIFE.

1 ALLEN (MASS.) 209.—1861.

PETITION for partition. At the hearing in this court it appeared that the land in question was devised to the heirs-at-law of William Hemmenway; and the principal question in issue was, whether the petitioner was his son. Certain evidence, which is stated in the opinion, was offered to prove the illegitimacy of the petitioner, and rejected by Merrick, J., and the respondents alleged exceptions.

METCALF, J. William Hemmenway and the mother of the petitioner were lawful husband and wife, and lived together, as such, until within six months next before the petitioner's birth, to wit, until April, 1834, when the mother deserted her husband, and has since cohabited with James Grover, who brought up and supported the petitioner till he was fifteen years old.

At the trial, the respondents attempted to show that the petitioner is not the legitimate child of William Hemmenway, by proof, in addition to the facts above stated, of the declarations of the said Hemmenway, the declarations of the said Grover, and the fact that the brothers and sisters and other relations of the said Hemmenway never recognized the petitioner as his heir. The judge refused to receive testimony as to either of these suggested facts; and in our opinion neither of them, nor all of them combined, could legally be proved for the purpose for which evidence thereof was offered.



It is established law that every child born in wedlock, when the husband is not shown to be impotent, is presumed to be legitimate, even though the parties are living apart by mutual consent; that this presumption (as held in modern times) may be rebutted by proof that the husband had no access to his wife during the time when, according to the course of nature, he could be the father of the child; but that the presumption cannot be rebutted by proof of the wife's adultery while cohabiting with her husband — the law not allowing the admission of evidence on the question, whether the adulterer or the husband is most likely to be the father of the child. The decisions on this subject are cited in 1 Greenl. Ev. sec. 28; Garde on Ev. 25; Best on Ev. secs. 303, 330; 2 Selw. N. P. (11th ed.) 758 *et seq.*; Rogers on Ecclesiastical Law (2d ed.), 88-98; 2 Kent's Com. (10th ed.) 236, 237. See, also, 2 Pothier on Obligations (Evans' ed.), 341-355, and 1 Erskine's Institutes (ed. of 1824), 153, 154.

Exceptions overruled.<sup>1</sup>

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#### ATKINSON, J., IN *HICKS v. SMITH*.

94 GA. 809, 812.—1894.

WE will first consider what the real status of this natural son is. At common law the rights of a bastard were few, and they such only as he could acquire. Having no inheritable blood, by operation of the law of descent, no estate could be imposed upon him. For in order to take by descent he must be capable of inheriting, and this he could not do because he was not and could not be an heir. Having the capacity to labor, there was no legal impediment to the acquirement of an estate by him. Being without inheritable blood, he was of kin to no one, could have no ancestor, could be heir to no one, and, for the same reason, he could have no heirs save those of his own body. In process of time, however, the rigor of the com-

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<sup>1</sup> "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was: 1. Incompetent. 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother. 3. Entirely absent, at the period during which the child must, in the course of nature, have been begotten. Or, 4. Only present, under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman." — *Hargrave v. Hargrave*, 9 Beaven (Eng. Ch.), 552, 555.

mon law has been in most countries where its rules prevail much abated, and its asperities so softened and tempered by humane legislative enactment, that bastards have many rights and are now accorded many privileges which, under the common law, were denied them. To this spirit of liberality, which at the present time seems to pervade the whole scheme of legislation with respect to these unfortunates who are in no sense responsible for their existence, may be attributed the statutes which are now of force in this state and by which the condition of the bastard is vastly improved.

The general assembly early saw the propriety of allowing a bastard to inherit from its mother, and bastard children of the same mother, without reference to their paternity, to inherit each from the other. The law of escheats forfeited to the state the estates of such persons who, dying intestate, left no heirs. It was held by some of the courts, that for want of inheritable blood in her descendants the bastard children of a mother dying intestate were incapable of taking her estate, and by force of the statute the same was forfeited to the state to the exclusion of those who upon the commonest principles of humanity, should and would have been the recipients of her bounty. For remedy of this palpable injustice, in 1816, the legislature passed an act the provisions of which are contained in section 1800 of the Code, and which relieves bastards of some of the disabilities imposed by the common law. So the act of 1850 was passed to allow bastard children of widows to inherit equally with those who were legitimate.

The status of the bastard as fixed by the common law, **except as changed by statute**, remains under our system of laws.

## DALTON v. THE STATE.

6 BLACKF. (IND.) 357.—1842.

ERROR to the Clay Circuit Court.

BLACKFORD, J. Joseph Griffith and Elizabeth, his wife, petitioned the Circuit Court for a writ of *habeas corpus* directed to Dalton, requiring him to bring before the court the body of a certain child aged fifteen months, and show the cause of its detention. The petition stated that said Elizabeth was the mother of the child, and that, since its birth, she had married the said Joseph Griffith.

A writ of *habeas corpus* was accordingly issued.

The defendant made the following return to the writ: 1, That the said Elizabeth, being unmarried, and alleging the defendant to

be the father of the child, gave it to him to keep, etc.; 2, That the Probate Court, the child being illegitimate, and its mother, the said Elizabeth being unmarried, appointed the defendant guardian of the child, etc.

Plea to the first cause of detention, that the said Elizabeth was the mother of the child; that since its birth she had married Griffith; and that she had never abandoned the child, etc.

Plea to the second cause of detention, that the said Elizabeth, the mother of the child, had no notice of the application for the appointment of the defendant as guardian of the child, etc.

There are several other pleas which it is not necessary to notice.

Demurrers to the pleas; demurrers overruled, and judgment for a return of the child to the mother, etc.

The first part of the return to the writ is insufficient. The mother of an infant illegitimate child is its natural guardian, and has a right to its custody. *Ex parte Ann Knee*, 1 New. R. 148; *Wright v. Wright*, 2 Mass. 109; *The People v. Landt*, 2 Johns. R. 375. The gift of the child to the defendant by its mother and natural guardian, as mentioned in the return, did not deprive her before her marriage with Griffith, nor did it deprive her and her husband after their marriage, of the right to the custody of the child during its infancy. The plea to the second cause of detention is valid. The mother, being the natural guardian of the child, could not be deprived of that guardianship by the appointment of another guardian, of the application for which appointment she had no notice.

*Per Curiam.* The judgment is affirmed, with costs.

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### BROCK v. THE STATE, EX REL. JOHNSON.

85 IND. 397.—1882.

ELLIOTT, J. The appellee insists that the bill of exceptions does not show that it contains all the evidence, and that consequently no questions are presented by this appeal. The bill does not, it is true, contain the usual formula, but it does contain a statement clearly and unequivocally showing that all the evidence is incorporated. Where the bill of exceptions fully shows that all the evidence given upon the trial is set forth, the precise form of words used in showing that fact is not of controlling importance.

On the 24th of September, 1877, the relatrix, Fanny Johnson, then Fanny Dunn, instituted proceedings against appellant, under the statute regulating proceedings in cases of bastardy; the justice before whom they were instituted made the proper order transfer-

ring the case to the Circuit Court; before trial in that court the relatrix and the appellant were married and the prosecution against the latter was dismissed. There is evidence tending to show that the appellant married the relatrix for the purpose of escaping from the prosecution against him, and that at the time he married her he intended to abandon her and the child. Some time after the marriage she applied for and obtained a decree of divorce.

The question for decision is, whether the relatrix can maintain proceedings under the statute to compel appellant to furnish means of support for the child born out of wedlock. If the marriage legitimized the child, then it is quite clear that the prosecution cannot be maintained. If the child was once made legitimate, no subsequent act could take from it this character, and give it that of illegitimacy. The case, therefore, turns upon the answer to the question, did the marriage subsequent to birth of the child legitimize it?

One among the old doctrines of the common law is the rule that children born during wedlock are legitimate, although begotten before marriage. Our cases, acting upon this rule, have declared that marriage bars a prosecution for bastardy in such cases. *Moran v. State ex rel.*, 73 Ind. 208; *Doyle v. State ex rel.*, 61 Ind. 324. But the rule is not decisive of this case, for the child of these parties was born before marriage.

The civil law declares that marriage legitimizes children born before marriage. The common law is different; a subsequent marriage does not legitimize such children. The bishops of England pressed upon the House of Lords the adoption of the rule of the civil law, but, as the old record runs: "And all the earls and barons with one voice answered that they would not change the law of the realm, which hitherto had been used and approved." The old chronicler, in speaking of this decision, says: "And the which noble, courageous and heroic answer, all the lawyers do mightily approve." As the common law prevails in our state, we must follow it unless we find it in conflict with some statute of our own.

Our statute adopts the rule of the Roman law, secs. 2475 and 2476, R. S. 1881. Mr. Schouler says: "This doctrine of the civil law has found great favor in the United States. It has prevailed for many years in the states of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio." Schouler, *Domestic Relations*, 309.

It is clear that the acknowledgment by the father made the child his heir apparent, and removed from it the stain of illegitimacy. It is not important whether the acknowledgment of legitimacy was



made for a good or for an evil purpose; it fixed the status of the child, and that cannot be changed by anything the father or mother may do. Having removed the "bar sinister," they cannot replace it.

The question here is, not whether the relatrix may have some cause of action against the appellant, but whether she can maintain a prosecution under the statute for the maintenance of a bastard child. As the child cannot be considered a bastard, it is very clear that the prosecution must fail.

Judgment reversed.<sup>1</sup>

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### *Adoption.*

#### HUMPHRIES *v.* DAVIS.

100 IND. 274.—1884.

ELLIOTT, J. Isaac Davis and his wife, Jesse Davis, adopted, as their child, Emily Davis, the natural child of Elizabeth Davis, now Elizabeth Krug. About a year after the adoption of the child, Mrs. Jesse Davis died, leaving as her only heirs her husband and her adopted daughter, and within a year the adopted daughter also died. The natural mother claims two-thirds of the land which her child inherited from Mrs. Jesse Davis, and conveyed part of it to the appellant. This claim the surviving husband resists, and the question is, Who shall have the land, the surviving husband or the natural mother? We deem it one of the important factors in this legal problem that the land vested in the child solely by virtue of its legal relationship to Mrs. Davis, and not by virtue of its natural relationship to any one. The title vested in the adopted child by force of law, and not because of any inheritable right springing from a natural kinship.

In the case of *Davis v. Krug*, 95 Ind. 1, this element was considered one of importance, and it was held that property derived by the child from one of the persons by whom it had been adopted went to its other parent by adoption, rather than to its natural mother. We limit our decision in this instance, as it was limited in the former case, to the property derived from one of the adopting parents by inheritance, and confine it to the question of the rights of the natural mother as against the surviving parent of the deceased child, who became such by law, and not by nature; but, in thus limiting our decision, we do not mean to intimate that if the property came

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<sup>1</sup> As to recognition in one jurisdiction of legitimacy acquired in another jurisdiction, see *Miller v. Miller*, 91 N. Y. 315.

to the adopted child otherwise than by inheritance from kinsmen of its own blood, the adoptive parents would not inherit to the exclusion of the natural mother. The case to which we have referred is decisive of this controversy, but as it has been vigorously assailed, we have, at the earnest solicitation of counsel, again examined the question.

The equity of the case is with the surviving husband and against the natural mother who gave up her child, sundering all maternal ties, and suffering a stranger to take a mother's place. The husband, who enabled his wife to acquire or preserve her property, has infinitely stronger claims than the natural mother, who cast aside her child. Rules of law are intended to secure justice, and justice requires that the husband who has maintained the wife should be preferred to the mother of the child which was the child of his wife only by adoption. Equity is natural justice, and natural affection and natural right make a strong equity in the husband's favor. Suppose that the claim were urged by a surviving wife, instead of the husband, in such a case as this, would it then be doubted that the wife, whose joint labor and care had aided in accumulating the property, should be preferred to the natural mother who was a stranger, both in blood and in law, to the person who was the source of title? Must the wife be put off with a paltry share to make room for a stranger who has no claim upon the bounty of the husband, nor, of right any place in the husband's affections? The principle which rules in the one case must govern in the other. We have shown the equity of the case for the reason that equity has a potent influence in the construction of statutes. Courts always endeavor to so construe a statute as to make it an instrument of justice. As Hobart, C. J., long ago said, "equity must necessarily take place in the exposition of statutes." Courts can neither wrest words from their plain meaning, nor violate the spirit of a statute upon their own notions of natural justice; but, where the statute is general in its terms, and not clear and definite in its letter and scope, courts may give it such a construction as will make its operation just and beneficial. To aver the contrary would be to assume that the legislature did not intend to make a just law. There is nothing in the statute before us requiring us to declare that the rights of a surviving husband shall yield to the rights of the natural mother of the child which he had joined with his wife in adopting. When the statute is read by the light of the civil law from which its principles are borrowed, and is considered in connection with the general principles of the law of descent and the statutes upon that subject, it becomes clear that its construction must be that which natural justice requires.

The common law made no provisions for the adoption of children, and we can get no light from that source. *Krug v. Davis*, 87 Ind. 590; *Ross v. Ross*, 129 Mass. 243; S. C., 37 Am. R. 321. The Roman law made provision for adopting children, and the provisions of that law, as revised and changed by Justinian, formed a complete system. Sandar's Justinian, 103, 105, 109. The adopted child was, as that law declared, "assimilated, in many points, to a son born in lawful matrimony." That law preserved to the child all the family rights resulting from his birth, and secured to him all the family rights produced by the adoption. Sandar's Justinian, 105. The Supreme Court of Louisiana, in discussing this subject, says: "And the effect was such that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person." At another place the court said: "Now, when in an enabling or permissive statute, the legislature has used a word so familiar in its ordinary acceptation, and so well known in the sources of our law, does it become the judiciary to say that it has not such meaning, because the law-giver has not himself expressly defined the sense in which he intended the word should be taken?" It is also said: "The law-giver ought not to be supposed ignorant of this state of things, or to use a term in a more restricted sense than it was formerly known to our laws." *Vidal v. Commagere*, 13 La. Ann. 516. It is true that the remarks of the court apply with rather more force to a state which has adopted the civil law than to one where the common law prevails, but they, nevertheless, declare a general principle which has a place in all enlightened systems of jurisprudence, for it is established law that where a rule is borrowed from another body of laws, courts will look to the source from which it emanated to ascertain its effect and force. *City of Valparaiso v. Gardner*, 97 Ind. 1. If, as the civil law so fully provided, a child of the adoptive son stood in the relation of grandchild to the adoptive father, then the son himself must stand as the child of that father. The statute of Massachusetts makes some exceptions as to the child's status, and it was held that the adoptive child as to property of the adoptive father stood as a natural child, save in so far as the exceptions declared otherwise, the court saying: "The adopted child, in this case, therefore, in construing her father's settlement, must be regarded in the light of a child born in lawful wedlock, unless the property disposed of by the settlement falls within one of the exceptions." *Sewall v. Roberts*, 115 Mass. 262.

In *Ross v. Ross*, *supra*, it was said, in reviewing the cases of *Schafer v. Eneu*, 54 Pa. St. 304, and *Commonwealth v. Nancrede*,

32 Pa. St. 389, "But the opinion in each of those cases clearly recognizes, what, indeed, is expressly enacted in the statute, that, as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such." Elsewhere in the opinion from which we have quoted it is said: "It is the rights, duties and capacities, arising from the event which creates a particular status, that constitute the status itself and afford the best definition of it." It is true that the law cannot do the work of nature and create one a child who by nature is a stranger, but it may fix the legal status of the child. While, therefore, the Pennsylvania court is right in saying that the law cannot make the child a natural one, the conclusion that the status of the adoptive child to the adoptive father may not be fixed by law does not follow by any means. The law may declare the status, and from the status courts must determine the correlative rights of parent and child thus created. One of the acutest of legal minds and clearest of writers says: "There are certain rights and duties, with certain capacities and incapacities to take rights and incur duties, by which persons, as subjects of law, are variously determined to certain classes. The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a condition or status which the person occupies, or with which the person is invested." 1 Austin, Juris. 41.

In *Burrage v. Briggs*, 120 Mass. 103, this doctrine was carried very far, for it was there held that the status of the adoptive child was such that it would take as a child under a residuary clause of the adoptive father's will, where the specific legacy had lapsed. It was decided in *Lunay v. Vantyne*, 40 Vt. 503, that as to the right to recover for services there was no difference between an adoptive and a natural child.

In the case of *Barnes v. Allen*, 25 Ind. 222, it was held that the adoptive child was the heir of the adoptive father in the degree of a child, and was entitled to inherit from him all the estate of which he could deprive his wife. This is impliedly an assertion that as to the adoptive parent the status of the adoptive child is, for the purpose of inheriting from the father, that of a natural child. The court, in *Isenhour v. Isenhour*, 52 Ind. 328, said: "The law can endow an adoptive child with all the rights in property of a natural child, but it has not the power to make him the natural child of any woman but his natural mother." It was also said, in speaking of the adoption by the husband, instead of by both the husband and wife, that "If he had been adopted by both, perhaps he might have been held as a child 'by a previous wife,' within the proviso in sec. 24 of the



act regulating descents." The cases of *Krug v. Davis*, *supra*, and *Davis v. Krug*, *supra*, very explicitly affirm that as to the adoptive parents and their property, the status of the person adopted is that of a natural child.

In a recent text-book it is said: "And the rights of the parent by adoption are treated substantially as those of a natural parent." 2 Schouler, Dom. Rel. sec. 232. This author thus interprets our case of *Barnhizer v. Ferrell*, 47 Ind. 335: "An adopted child usually inherits from the adopting parent, and *vice versa*; but otherwise as to collateral kindred." Schouler, Dom. Rel., sec. 232, n.

In the case referred to, the court correctly laid down the law as to the status of the child, but, misled by confusing a natural relation with a legal status, was carried to an erroneous conclusion. The failure to give just importance to the difference between a legal status and a natural relation is the error that invalidates the reasoning in that case, for the court there affirmed the existence of the status, but stripped it of the incidents inseparably annexed to it, and this was a plain violation of the logical principle that when properties necessarily inhere in the thing, they cannot be separated from it. Having affirmed the existence of the legal status, the properties inseparably connected with it should also have been affirmed as governing facts in the case. That we are right in our view is evidenced by the summing up of the result of the reasoning in that case. "In such case," said the court, in speaking of the adoption by the father only, "the child might inherit from the adopted father, but not from his wife. He would have an adopted father, but not an adopted mother. He would have no right as her child." This, surely, is a full recognition of the status of the adopted child, and, if it be, then the correlative relation of father must also exist. What was decided in *Hole v. Robbins*, 53 Wis. 514, is shown in the concluding statement of the opinion, which reads thus: "In the case at bar, the property which is claimed by the adopted parents came to the child from the natural parents, and justice would seem to demand that it should descend to them or their kindred upon his death; and there being nothing in the statutes concerning the adoption of children which clearly indicates an intention on the part of the legislature to change the order of descent from the adopted child, we must, upon authority and principle, hold that the property descends according to the general law regulating the descent of real estate." It will be readily perceived that the decision from which we have quoted cannot be authority to prove that the natural heirs shall take, to the exclusion of a surviving adoptive parent, property which the child acquired solely by virtue of his legal

status, or that the status of the adoptive child is not, as to all legal incidents, the same as that of a natural child.

The point of decision in *Wagner v. Varner*, 50 Iowa, 532, is, that where a father adopted two children of his daughter, and afterwards died, leaving no will, the children so adopted inherited from him as his own children, and inherited, also, the share of their deceased mother. The court said: "By the act of adoption these children became in a legal sense the children of John Bumer." This is an explicit declaration of the legal status created "by the event" of adoption.

In *Keegan v. Geraghty*, 101 Ill. 26, the court held that the adoptive child could only inherit from the adoptive parents, and could not inherit from the lineal or collateral heirs of the parents, and this ruling, it is clear, does not controvert the proposition that the status is the correlative one of parent and child. The case of *Reinders v. Koppelman*, 68 Mo. 482,<sup>1</sup> decides that the status of parent and child exists, but that the right of inheritance is, by force of the statute, vested only in the child, thus narrowing the whole question to the one statute.

The authorities we have discussed unite in affirming that the status of an adoptive child for all legal purposes, and as to the property inherited from an adoptive parent, is that of a natural child. This supplies a premise which guarantees the conclusion that the adoptive father must inherit from it property which came to it from his wife and the child's adoptive mother. It is, indeed, the only logical conclusion deducible from the premise granted. If there is a child, there must be a parent. The status of child necessarily imports that of parent. From this conclusion there is no escape unless logic is defied or disregarded. Parent and child are correlative terms; the one relation implies the other. It is logically impossible to conceive the relation of child without in the same conception implying that of parent. To affirm that there is a child is to affirm, upon axiomatic principles, that there is a parent, for one correlate implies the existence of that of which it is the correlative. The logicians thus state this logical principle: "Where the terms are correlative in the same subject, if one is predicated of the subject the other must be also." If, then, we predicate of the subject, property inherited from an adoptive mother, the status child, we must predicate of the same subject the correlative status, father.

It is, as we have seen, the legal status of the person respecting the subject that determines his legal rights. To again quote from

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<sup>1</sup> This case is discussed in *Reinders v. Koppelman*, 94 Mo. 338.

Austin: "The law of persons is the law of status or conditions. \* \* \* The rights and duties, capacities and incapacities which constitute a status or condition, are commonly considerable in number and various in kind. \* \* \* Such are the rights and duties, capacities and incapacities of husband and wife, parent and child, guardian and ward. 2 Austin, Juris. 709, 711. As the status of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by the adoption is that of a father, since it is of that property, as the subject, that the status of parent and child is predicated. This is a just as well as a logical result. It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title.

Not only is the conclusion which we have stated that to which the cold rules of logic and the benign ones of natural equity lead, but it is also the conclusion to which the general principles both of the American law and the Roman law lead. It is a principle of both systems of jurisprudence, that in case of failure of descendants capable of taking, the inheritance shall go back to the kinsmen of the blood from which it came. Our statute fully recognizes this general principle, for it provides that when the inheritance comes from the paternal line, it shall go back to the kinsmen of that blood, but when the inheritance comes from the maternal line, it shall go back to the kinsmen of the mother's side. R. S. 1881, sec. 2471. In analogy to this general principle, it should be held that one connected by so close a relationship as that of husband should be preferred to a person who bore no relationship whatever to the ancestor. It must be presumed that the legislature meant the statute for adoption of children to confer rights consistent with the general policy of the law, and not to produce discord by breaking the unity of the general system. To produce uniformity and harmony, it must be held, as we now hold, that the death of the adoptive child casts the inheritance which came to him through the joint adoption, back to his adoptive father, and not upon the natural mother, who was an utter stranger to the person from which the title flowed. It may be that this would require that what the adoptive child inherits from its natural kinsmen shall go back to them, but, if so, it is a good result, for this is no more than just. This was the civil law, and the principle is declared and enforced in two of the cases cited. The rule which we adopt does not cut off the adoptive child from

inheriting from its natural relatives. It may inherit from them and from its adoptive parents. This was the rule of the civil law. Sandar's Justinian, 105. The principle is declared in *Hagner v. Varner*, *supra*, where it was said: "Because of the adoption the child acquires certain additional rights, but there is nothing in the act of adoption which in and of itself takes away other existing rights, or such as may subsequently accrue." The reason which supports this rule does not apply to the mother. She, in legal effect, severs all legal rights to the property which the child may acquire by virtue of its status to the adoptive parents, for, as to that property, she permits the correlative relation of parent and child to exist between the child and the adoptive parents. It does her no injustice to leave her with her right to such property as her child may acquire otherwise than through the adoptive parents, but it would do great injustice to permit her to secure the property acquired by her child in virtue of both its natural and adoptive rights.

If it be the law that an adoptive parent cannot inherit from the child of his adoption in such a case as this, then most harsh and unjust consequences will result from the law. We suggest one instance where this would be the result: A child is adopted by a husband and wife, the wife dies the owner of \$100,000 of real estate, then the child dies, without a natural kinsman, near or remote, and the result (if the law be that the adoptive father cannot inherit) is that two-thirds of the land escheats to the state. We have put this case because it is not an improbable one, for many children who are adopted into families are waifs whose parents and kinsmen are unknown. We are not willing to declare a rule that will lead to such results.

The Supreme Court of Missouri recognize and lament the injustice of the rule which it adopts, for we find in the opinion this language: "It may seem great injustice that the property derived from one source should go in a channel never contemplated by the donor." In speaking of the rule of the Code Napoleon and of the civil law, that the property which came to the child from its natural kinsmen shall go back to them, and that when the estate came from the adoptive parents, it should go back to these parents, the court said: "Such a provision commends itself to our sense of justice, but it is not in our statute. What changes, if any, were intended to be made in our statute of descents in connection with this law of adoption is a mere matter of conjecture, and we have no authority to depart from the rules of descent established in the general statute on that subject." We concur with that learned court in its denunciation of the rule it adopts, but we cannot think that it was neces-



sary to adopt it. We are convinced that the court, in *Barnhizel v. Ferrell*, *supra*, and in the case from which we have quoted, took entirely too narrow a survey of the question. A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. *Taylor v. Board*, etc., 67 Ind. 383; *State ex rel. v. Swope*, 7 Ind. 91; *Prather v. Jeffersonville, etc. R. R. Co.* 52 Ind. 16; *Allison v. Hubbell*, 17 Ind. 559; *Aurora, etc. R. R. Co. v. City of Lawrenceburgh*, 56 Ind. 80; *Hedrick v. Kramer*, 43 Ind. 362. As it was said in *Aurora, etc. R. R. Co. v. City of Lawrenceburgh*, *supra*, "Construction has ever been a potent agency in harmonizing the operation of statutes with equity and justice." Statutes are to be so construed as to make the law one uniform system, not a collection of diverse and disjointed fragments. When this principle of construction is adopted, "an enactment of to-day has the benefit of judicial renderings extending back through centuries of past litigation." Bishop, *Written Laws*, sec. 242b. "A statute," says the author just referred to "must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble." "The completed doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence, as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms." Bishop, *Written Laws*, secs. 113a, 86.

Judgment affirmed.<sup>1</sup>

<sup>1</sup> See also *In re Thorne*, 155 N. Y. 140.

In *Reinders v. Koppelman*, 94 Mo. 338, 344, where an adopted child claimed under a will which devised property to "the nearest and lawful heirs of mine," Justice Brace said: "The status or relation of an adopted heir is a lawful one, since the law sanctions and provides a method for its creation; but the relation is not the creature of the law, but of the deed of adoption. A child by adoption is, in a limited sense, made an heir, not by the law, but by the contract evidenced by deed. 'Adopted heir,' or 'heir by adoption,' would be appropriately descriptive of such relation; contra-distinguished from such an heir are those upon whom the law casts descent, who are constituted heirs by law. These are appropri-

STRAHAN, J., IN FURGESON *v.* JONES.

17 ORE. 204, 213.—1888.

I THINK the findings show that the attempted adoption was never consummated, because the statute under which the proceedings were had was never complied with. The statute requires the consent in writing of the parents, unless they are brought within its exceptions. Here only one parent consented, and there was no attempt made to bring him within the exceptions contained in the statute, and the petition was not served upon him. A question closely akin to this in principle came before the Supreme Court of Iowa, in *Tyle v. Reynolds*, 53 Iowa, 146, and the court said: "Therefore, a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute. The statutory conditions and terms are that the written instrument must be executed, signed, and acknowledged, and filed for record; when this is done the act is complete. If the named requisites are not done, then the act is not complete, and the child cannot inherit from the parent by adoption. The filing for record is just as important in a statutory sense as the execution or acknowledgment. One may be dispensed with as well as the other, for the right depends solely upon the statute. There is no room for construction, unless we eliminate words from the written law, and this we are not authorized to do." *Long v. Hewitt*, 44 Iowa, 262, and *Keegan v. Geraghty*, 101 Ill. 26, lay down, in effect, the same principle.

In the state of New Jersey a statute is in force very similar to ours, which came before the prerogative court of that state and received a construction in *Luppie v. Winans*, 37 N. J. Eq. 245. In that case the court said: "The child was under fourteen years of age, and the court, as appears by the opinion, construed the statute as requiring no consent, either on part of parent or child, to the adoption in such case, but held that in such cases the statute confides the whole matter to the discretion of the Orphans' Court without regard to the wishes of either parent or child. This construction is entirely inadmissible. It would make the law liable to be the instrument of the forcible transfer of one man's child to another person, in spite of the parent's opposition, provided the court deems it advantageous for the child that the transfer be made. The law ex-

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ately described as heirs-at-law or heirs by the law. \* \* \* The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words, 'lawful heirs,' and those words ought not be held, *ex vi termini*, to include an adopted heir."

pressly gives to the decree of adoption the effect of severing absolutely the legal ties between the parent and the child, and putting an end to their reciprocal relations. It declares that from the date of the decree, the rights, duties, and privileges, and relations between the child and the parent, except the right of inheritance, are severed, and transforms them all. \* \* \* A just and, it seems to me, an obvious and necessary construction, of our statute of adoption is that if the child be under fourteen there need be no consent on its part, but the consent of the parent or parents, if there be any living, provided they be known and not hopelessly intemperate or insane and have not abandoned the child, must be obtained." The same view seems to prevail in Pennsylvania under the statute of that state. The only case cited upon the argument from that state is *Booth v. Van Allan*, 7 Phila. 401; *Hurley v. O'Sullivan*, 137 Mass. 84. The court, in passing upon the effect and construction of the statute said: "But there is one other objection which we think is fatal. The act of May 4, 1855, empowers the court to make a decree of adoption with the consent of the parents or surviving parent, or if there be none, of the next friend of an infant. The strict legal signification of the term 'parents' is the lawful father and mother of the child; but it may be questioned whether it does not mean more than this in the act of 1855,—whether the words ought not rather be taken to mean those who stand in the relation of father and mother to the infant. If this be the correct view, then the proceedings for leave to adopt the infant as hers are void for want of consent of parents. New Hampshire has a statute similar to ours, which came before the Supreme Court of Massachusetts in *Foster v. Waterman*, 124 Mass. 592. A child of persons resident in the state of Massachusetts had been adopted in the state of New Hampshire and the validity of said adoption was the question to be decided, and the court held that such a statute is not to be presumed to extend to a case in which the domicile of those petitioning for leave to adopt a child is in another state; the provision in the statute of New Hampshire, that the decree may be made in the county where the petitioner of the child resides, implies that the statute is intended to be limited to cases in which all the parties have their domicile in that state."

It was claimed, however, that the adoption was complete as to the defendant, and the other persons who were, in fact, parties to the record. This construction was pressed upon the Supreme Court of Iowa in *Shearer v. Weaver*, 56 Iowa, and rejected, the court saying: "Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property,

the rights of inheritance must be acquired in that manner, and can be acquired in no other way."

From these citations, and the plain import of the statute itself, it is manifest that the attempted adoption of the plaintiff by Jones and wife was never consummated, and that the plaintiff never acquired any rights to inherit Jones' property by reason of the facts found by the court.

The proceedings were fatally defective because the father of the child did not consent to the adoption, nor was any notice of the application for such adoption served upon him, nor did he appear; and being a non-resident of the state, I am inclined to the opinion the statute did not apply to him. However that may be, the proceedings were fatally defective on the other grounds.<sup>1</sup>

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### *Step-Children.*

#### FRETO *v.* BROWN.

4 MASS. 675.—1808.

PARSONS, C. J. The action is assumpsit by Freto, a minor, who was fifteen years old in 1805, to recover of Brown his earnings in Brown's service during that year.

The parties have agreed on a case, in which it is stated that the plaintiff's father is dead, and his mother married to Robert Pierce; that during the year 1805, the plaintiff lived in the family of his father-in-law, and was maintained by him; but was a fisherman in the defendant's fishing schooner for the season, in which he earned the money demanded in this action, exclusive of the advances made for his use by the defendant, which are deducted. The balance is \$71.87, which Pierce, the father-in-law, also claims.

The father-in-law is not obliged to maintain the plaintiff, and consequently is not entitled to his earnings. While the plaintiff lived in his family, and was maintained by him, he must be considered a servant *de facto* as to strangers, who cannot question the right of the father-in-law to his minor's earnings. But this rule cannot bind the minor. He may quit the family at his own discretion, and can make no contract, which he cannot avoid, except for necessities. The father-in-law may recover against him for necessities, upon an implied assumpsit, but he cannot claim his earnings against the minor's

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<sup>1</sup> As to the status of an adopted child in a jurisdiction other than that in which he was adopted, see *Ross v. Ross*, 129 Mass. 243.



consent. If he could, the earnings might greatly exceed the expenses of maintenance; the whole of which the father-in-law would receive, and the next moment might turn him out of doors.

In this case, it was intimated that the mother is guardian by nature, and that her right devolves on her husband. We know of no such right of devolution. If the right devolved, the duty must devolve; but it is clear that the father-in-law is not obliged to maintain his children-in-law, whether the mother be living or dead.

Judgment must be entered for the plaintiff for \$71.87, the balance of his earnings, with costs.

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SMITH *v.* ROGERS.

24 KANS. 140.—1880.

VALENTINE, J. This was an action brought by the plaintiff in error, in the Probate Court of Shawnee county, on an account against the defendant in error, as executor of the estate of Emma J. Rogers, deceased, who at the time of her death was the wife of the defendant in error. When the said Emma J. Rogers was seven years of age, her mother intermarried with plaintiff in error, and said Emma J., with her brother, lived with her mother and step-father as one of the family, working and discharging the duties of a child, without any contract or understanding that she was to be paid for her labor, or that she was to pay for her maintenance. After she became of age, she married the defendant, and soon after her marriage, died. The account of plaintiff in error is for board and clothing, furnished to the said Emma J., his step-child, while she was a minor. The plaintiff proved his account in accordance with the facts above stated, and rested; whereupon the defendant in error moved the court for judgment upon the pleadings and evidence, which motion was sustained by the Probate Court. The plaintiff took the case to the District Court on petition in error, where the judgment of the Probate Court was affirmed, and the plaintiff now brings the case to this court for review.

The only errors complained of by the plaintiff in error as occurring in either the Probate Court or the District Court, are as follows: First, The court erred in sustaining the motion of the defendant for judgment. Second, The said judgment was given for the said defendant, when it ought to have been given for the said Charles E. Smith, according to the law of the land.

Did either court commit any substantial error? For the purposes of this case, we shall suppose that the plaintiff in error has so

preserved his exceptions to all questioned rulings of the courts below, and so got his case into this court, that we may hear and determine the case upon its merits; but this supposition is extremely favorable to the plaintiff in error. Upon the merits of this case we think the plaintiff in error must fail. He cannot recover for the board, clothing, etc., for which he has charged. During all the time while he was furnishing such board, etc., he stood in *loco parentis* toward the said Emma J. Rogers, then Emma J. Hill. They sustained the relation toward each other of substantially parent and child. When said Emma J. was only seven years old, and living with her mother, Mrs. Susanna Hill, the plaintiff married the mother and took the child along with the mother to live with him; and from that time on, for about twelve years, the girl lived with her mother and the plaintiff as one of their family, receiving boarding, clothing, schooling, etc., and performing services as one of the family with no thought or expectation on the part of any one that anybody should give or receive any other or further compensation for these mutual benefits and services. When the girl was about nineteen years old, she married the defendant, and soon afterwards died. The defendant having been appointed her executor, the plaintiff commenced this action in the Probate Court against him, with the result aforesaid.

We think the decisions of the courts below were correct. We think Mr. Schouler, in his work on Domestic Relations (p. 378), states the law governing this case very correctly. His language is as follows: "It is well settled that, in the absence of statutes a person is not entitled to the custody and earnings of step-children, nor bound by law to maintain them. Yet, if a step-father voluntarily assumes the care and support of a step-child, he stands in *loco parentis*; and the presumption is that they deal with each other as parent and child, and not as master and servant; in which case the ordinary rules of parent and child will be held to apply, and neither compensation for board is presumed on the one hand, nor for services on the other." We do not think that the plaintiff is entitled to recover in this case, and hence the judgment of the court below must be affirmed.

All the justices concurring.<sup>1</sup>

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<sup>1</sup> Accord, *Livingston v. Hammond*, 162 Mass. 375.

## PART III.

### INFANCY.

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#### *Period of Infancy.*

THE STATE *v.* CLARK.

3 HARR. (DEL.) 557.—1840.

THE defendant was presented by the grand jury for illegal voting at the late inspector's election.

The presentment set forth these facts, to wit:—That the defendant was born on the 7th of October, A. D. 1819, and voted at the election held on the 6th of October, 1840, upon age. In his behalf a motion was now made to quash the presentment on the ground that it appeared from the face of it that the defendant was of full age at the time he voted, and was, therefore, not guilty.

BAYARD, C. J. Many persons suppose that the expression in the Constitution relative to the qualifications of voters is, that citizens between the ages of twenty-one and twenty-two years shall be entitled to vote without paying tax; and on this the common, but erroneous notion is, that a man must be in point of fact actually within his twenty-second year before he can vote. The premises and conclusion are both wrong. "Every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax." (Const. art. 4, sec. 1.) To ascertain when a man is legally "of the age of twenty-one years," we must have reference to the common law, and those legal decisions which from time immemorial have settled this matter, in reference to all the important affairs of life.

When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a man may do, and an infant, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day before the twenty-first anniversary of his birthday.

It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is, therefore,

of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday; and upon any and every moment of that day may do any act which any man may lawfully do. 1 Chit. Gen. Prac. 766. "It is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversary of his birth; thus, if a person were born at any hour on the first of January, A. D. 1801 (even a few minutes before twelve o'clock on the night of that day), he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done upon one moment of the day or another."

On the face then of this presentment, it appears that Mr. Clarke was entitled to vote on the 6th of October, being on that day of the age of twenty-one years; and the presentment, showing no offence, must be quashed.

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### *Voidability of Contracts.<sup>1</sup>*

#### WILDE, J., IN OLIVER *v.* HOUDLET.

13 MASS. 237, 238.—1816.

THIS case turns on a question of property, depending upon two sales of cattle, made by the plaintiff to one A. J. S. G. Lithgow. It has been contended that these sales were void *ab initio*, the said Lithgow being a minor, not capable by law of making a valid contract.

Doubtless an act merely void may be treated as a nullity by either party, and even by a stranger. Some acts of infants are of this description; and it has been said that all such as are apparently prejudicial to his interests are to be so considered. Thus, a grant, surrender, or lease, by an infant, without reservation of rent, have been adjudged void; such acts being apparently to the infant's prejudice. But in the case of *Zouch v. Parsons*,<sup>2</sup> they were held to be voidable only; and for reasons which seem very cogent and satisfactory.

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<sup>1</sup> A valuable and exhaustive critical treatment of the law relating to infants' contracts is found in 18 Am. St. Rep. pp. 573-724.

<sup>2</sup> 3 Burr. 1794; s. c., 1 W. Bl. 575.



It would be more correct therefore, to say, that those acts of an infant are void which not only apparently, but necessarily, operate to his prejudice. The benefit of the infant is the great point to be regarded; the object of the law being to protect his imbecility and indiscretion from injury, through his own imprudence or by the craft of others.

The general rule is, that infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore that his contracts, although voidable by him, shall bind the person of full age. This rule seems to require that all contracts of infants should be held voidable, rather than void. But, however this may be, all the books agree that those which are beneficial, or have a semblance of benefit, to the infant, are only voidable. Of this character are all sales made by persons of full age to infants. These have at least the semblance of benefit to the vendees. No case can be found in which such a sale has been held void, or voidable by the vendor, on the ground of the vendee's infancy. Even a *feme covert*, whose conveyances and other contracts are clearly void, may purchase an estate without the consent of her husband; and the conveyance will be good, until avoided by him during coverture, or by her after his death.<sup>1</sup>

Most clearly then the sales under consideration are not void.

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### WEAVER *v.* JONES.

24 ALA. 420.—1854.

CHILTON, C. J. Jones sued Weaver in assumpsit, for the use and occupation of a lot in Selma. It appears from a bill of exceptions, which was sealed upon the trial, that the plaintiff, Jones, while an infant, had sold the lot, and executed his bond for title in the usual form; after he arrived at age, he disaffirmed the contract, paid Weaver back the purchase money, with the interest, and received back his bond. Weaver, in the meantime, had made valuable and permanent improvements on the lot, in the erection of a livery stable. This suit is brought by Jones, to recover rent for the time Weaver occupied the lot; and Weaver insists that he should be allowed to recoup the value of his improvements, which gave to the lot its principal yearly value; the rent, aside from such improvements, being quite inconsiderable.

The court, among other things, charged the jury that, if the

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<sup>1</sup> 2 Bl. Com. 293; Co. Lit. 3a.

plaintiff (Jones) was a minor at the time of selling the lot, and they should find that such sale was not an advantageous one to the plaintiff, then the contract would be void, and the damages could not be recouped.

The counsel for the defendant in error endeavors to maintain the correctness of this charge, upon the alleged ground that a bond with a penalty, given by an infant, is absolutely void, and that being void, the defendant below must be regarded in the light of a mere trespasser, and as such not entitled to recoup for improvements.

If this position be correct, we think it is very clear the plaintiff, Jones, has no standing in the court; for the action of assumpsit will not lie, in the absence of a contract either expressed or implied; and no contract for the payment of rent is implied, by law, as against a mere naked trespasser. The owner, in such case, must resort to his action of trespass, to recover damages for the tortious entry and holding of the premises. True, there are cases when the owner of the term may elect to treat one who trespasses on him as his tenant, after the term expires, for otherwise he would be remediless. Such was the case of *Catterlin v. Spinks*, in 16 Ala. 467. So, also, in cases of permissive holding, as where the party in possession holds under a verbal contract of purchase, which he repudiates. The case of *Davidson v. Earnest*, in 7 Ala. 817, furnishes an illustration of this latter class. See, also, *Rochester v. Pierce*, 1 Camp. 466, and *Hull v. Vaughn*, 6 Price Exchq. Rep. 157. If, however, the bond in this case be absolutely void — a mere nullity — and the party a mere trespasser, the case falls under neither of the qualifications above stated. There would be no demise, express or implied, and no permissive holding. To entitle the plaintiff below to a recovery, it is, therefore, necessary to affirm the validity of the bond for some purpose, as amounting at least to a permission to the plaintiff in error to occupy.

But is a bond for title, given by an infant, an absolute nullity? The old cases, and several elementary writers who follow them, maintain the affirmative of the proposition; but we think it clear, both upon principle and the current of modern cases, that it is not.

The object of the rule which enables an infant to repudiate his contracts, when he arrives at full age, is to furnish him a shield or protection against the improvident bargains he may enter into, resulting from presumed incapacity, by reason of his youth, to contract. It may often happen that his contract may prove a very beneficial one to him, and he may desire, when of age, to affirm it, which he could not do if it were void.

The better opinion, as maintained by the modern decisions, is,

that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of non-age; that is to say, the infant may ratify them, after he arrives at the age of legal majority. Parsons on Contracts, 224 and notes; 1 Amer. Leading Cases, 103, 104. The rule, as recognized by the charge, that the court, or (as in this case) the jury, must determine whether the contract was beneficial or prejudicial to the infant, and hold the contract voidable or void according to the result of such finding, has been rejected by many of the courts in modern times, as unsatisfactory and unsafe in its application, and as often contravening the principle upon which it was founded, namely, the benefit of the infant. It is certainly more conducive to his benefit to afford him the opportunity of affirming, when of age, a contract which he may determine to be beneficial, than for the court or jury to determine this question for him. 15 Wend. 631; 1 J. J. Mar. 236; Parsons on Con., note e, to page 244.

We must consider Weaver as holding possession of the lot under a contract for its purchase, which was voidable, and as holding by permission of Jones, the plaintiff, who may, therefore, treat him as his tenant, and maintain this action of *indebitatus assumpsit* for use and occupation.

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Let the judgment be reversed, and the cause remanded.<sup>1</sup>

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<sup>1</sup> "There is a good deal of confusion in the cases in regard to the nature of the contract entered into by an infant. Under the early English and American cases, it was said that the contracts of infants were of three kinds. First, those clearly for his benefit, such as contracts made for necessities, which were said to be binding like any contract made by two persons of full age. Secondly, those which were clearly against the interest of the infant; these were said to be void, and there was a third or intermediate class which constituted the bulk of all contracts made by infants, which might or might not be to his advantage, and were voidable; that is to say, when the infant came of age he might either affirm or disaffirm these contracts.

The later rule, however, and the rule which seems supported by the weight of authorities, and certainly one much more sound upon the grounds of reason, is that all contracts of an infant are voidable, except, first, the implied contract for necessities, which is binding, and secondly, the warrant of attorney, and perhaps some other powers of attorney, of an infant, which is void."—HOLLINGSWORTH, Law of Contracts, p. 18 (1896).

"From a careful examination of the modern decisions and text-writers, we are satisfied that the following propositions may be regarded as settled: First, that an infant's contracts for necessities are as valid and binding upon the infant as the contracts of an adult, and that such contracts cannot be disaffirmed, and need not be ratified before they can be enforced; second, the contract of an infant appointing an agent or attorney in fact, is absolutely void and incapable of ratification; third, any contract that is illegal, by reason of being against a stat-

TRUEBLOOD *v.* TRUEBLOOD

8 IND. 195.—1856.

PERKINS, J. Bill in chancery, under the old practice, to compel a specific performance, and to set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845, William Trueblood was an infant, and owner of a piece of land. At that date, Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single — simply the bond of Richard — and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond, and afterwards sold and conveyed the land to another — Robert Lockridge — who had notice, etc. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done.

As we have seen, the bond is not, in terms, the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. 5 Ind. R. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at

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ute or public policy, is absolutely void and incapable of ratification; fourth, all other contracts made by an infant are voidable only, and may be affirmed or disaffirmed by the infant at his election when he arrives at his legal majority.

"The second proposition may not be founded in solid reason, but it is so held by all the authorities."—BUSKIRK, J., in *Fetrow v. Wiseman*, 40 Ind. 148, 155.



age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified (5 Ind. R. 353); if the latter, it can be. Reeves' Dom. Rel. 240.

In the first volume of American Leading Cases, 3d ed., p. 248 *et seq.*, the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing, as to contracts, is the appointment of an agent or attorney.

Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is law. See the cases there collected.

The law seems to be held the same in England. In *Doe v. Roberts*, 16 M. & W. 778, a case slightly like the present, in some respects, the attorney, in argument, said, "Here a tenancy has been created, either by the children, or by Hugh Thomas, acting as their agent." Parke, B. replied, "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So, here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See 8 Blackf. 345. The decree below must, therefore, be affirmed with costs.

GOOKINS, J., having been concerned as counsel, was absent.

*Per Curiam.* The decree is affirmed with costs

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### HARDY *v.* WATERS.

38 ME. 450.—1853.

ASSUMPSIT, on a promissory note, payable to a minor, who was under guardianship. The note was endorsed to the plaintiff, by a brother of the payee, also a minor, being authorized by the payee to write his name thereon. Since this suit was commenced, the guardian had approved of the transfer to plaintiff.

The defence was, that the note had not been legally negotiated, and therefore the plaintiff could not maintain this action. The court ruled otherwise, and the plaintiff recovered the amount of the note. Defendant excepted.

SHEPLEY, C. J. It is admitted that an infant may transfer a promissory note payable to himself by indorsement. It is denied that he can confer upon another the power to do it for him; the reason is, that an indorsement by an infant is voidable, while his act conferring power upon another to do it for him is void.

If the act of transfer in this case be voidable only, it is to be regarded as valid until avoided; and it can be avoided only by the infant or his heir or personal representative. If the power to indorse by another was void, it could not be ratified, and the plaintiff could acquire no legal interest in the note; and the approval of the guardian since the commencement of the suit cannot aid him.

In the case of *Whitney v. Dutch*, 14 Mass. 457, the right of an infant to empower another, otherwise than by an instrument under seal, to do an act for him, which he might lawfully perform himself, was fully considered. It was admitted, if the court were confined to the letter of the authorities, it must conclude, that the act could not be performed by delegated power.

Considering that the object of the law was to protect infants from injury, and that this would be fully effected by regarding contracts so entered into as voidable and not void, the court came to the conclusion that there could be no difference, upon principle, between the ratification of a contract made by an infant and one made through the intervention of another person acting under parol authority from him.

Changes in the law respecting negotiable paper are undesirable, and should not be made without strong reasons for them. The decision in that state was made, and the rule of law established, while this state composed a part of it. It should not, after it has been so long received as the law, be abrogated merely because other highly respectable courts have come to a different conclusion, especially when it is not perceived that it has been, or is likely to be, productive of any injustice or mischief.

Exceptions overruled.

TENNEY, APPLETON and RICE, JJ., concurred.<sup>1</sup>

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<sup>1</sup> See also *Hastings v. Dollarhide*, 24 Cal. 195.

MITCHELL, J., IN *COURSOLLE v. WEYERHAUSER*.

69 MINN. 328, 332. — 1897.

THE rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question remains — which to our minds is the most important one in the case — whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wishes to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text-writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact. On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time. The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court. See Freeman's

note to *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 629 (S. C., 13 S. W. 906); Schouler, Dom. Rel. § 406; Ewell's Lead. Cas. 44, 45, and note; Bish. Cont. § 930; Metc. Cont. (2d Ed.) 48; *Whitney v. Dutch*, 14 Mass. 457-463; *Bool v. Mix*, 17 Wend. 119-131. Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority.



*Avoidance of Contracts.*

I. AVOIDANCE DURING MINORITY.

TOWLE *v.* DRESSER

73 ME. 252.—1882.

BARROWS, J. Trover for a horse. The following facts may be regarded as established by the testimony here reported.

In October, 1876, being then minors aged respectively eighteen and sixteen years, the plaintiffs sold and delivered at their own house their colt to the defendants residing in a distant county, receiving therefor two promissory notes of one of their townsmen amounting to two hundred dollars, payable to the defendants or bearer, and indorsed by one of the defendants. The following summer one of the notes having become due and remaining unpaid, an attorney at law, employed by the plaintiffs with the assent of their father, went with the notes which he tendered to each of the defendants and demanded the colt. The defendants refused to receive the notes or return the colt, and thereupon this suit was instituted, October 9, 1877, their father appearing as *prochein ami*, never having been appointed their legal guardian. The defendants severally pleaded the general issue, with brief statements asserting that the sale was made as above to one of them; that it was never legally rescinded nor any tender of the notes made to, or legal demand for the restoration of the colt upon either of them, and denying the refusal to return or the conversion. The notes were placed upon the clerk's files for the use of the defendants and their attorney notified of the fact. A nonsuit having been ordered, the question is, whether upon the above facts the action is maintainable, and this involves the inquiry: 1. Whether minors can rescind an executed sale of their personal property during their minority? 2. Whether they can notify the vendee of their election to rescind, offer to return the consideration and demand a restoration of their property by an agent? 3. Whether, if the response to such notification, offer and demand is a simple refusal by the vendee to accept the return of the consideration and to restore the property, without objection on the ground of want of authority in the agent to make the demand, it would be competent for the jury to find a waiver on the part of the vendee of any possible defect in the demand on that score, and a conversion by him accordingly.

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I. As to the power of minors to rescind an executed sale of their personal property during minority upon returning the consideration received. We find no good reason either upon principle or authority to deny that power. It is the legitimate use of the shield with which the law covers their supposed want of judgment and experience, and places both parties in *statu quo ante*, a condition of things of which it would seem neither ought to complain. By reason of the transitory nature of personal property, to withhold his right from the infant, perhaps for a term of years, until he became of age, would, in many cases, be to make it utterly valueless.

In support of their denial of its existence, defendants rely upon *Roof v. Stafford*, 7 Cowen, 179, and the *dictum* of a former learned justice of this court, in *Boody v. McKenney*, 23 Maine, 525.

The case in 7 Cow. 179, was reversed on appeal, *Stafford v. Roof*, 9 Cowen, 626, where it was held that although he could not avoid a conveyance of land until he became of age, he might a sale of chattels. The power is expressly recognized in *Shipman v. Horton*, 17 Conn. 483; *Carr v. Clough*, 26 N. H. 280, 293.

And this is the principle upon which alone the numerous class of cases proceed in which the minor after he has worked for a man has been allowed to repudiate his contract to labor for a fixed period of time at a certain rate of wages, and to recover by suit through the intervention of a next friend what his work was fully worth without regard to his stipulations. For illustration, see *Judkins v. Walker*, 17 Maine, 38; *Derocher v. Continental Mills*, 58 Maine, 217; *Boynton v. Clay*, Id. 236; *Vehue v. Pinkham*, 60 Maine, 142.

The learned judge who uttered the *dictum* in *Boody v. McKenney*, 23 Maine, 525, would never have recognized it as an authority or decision of the point. It was purely a *dictum*, put forth, apparently on the strength of the case in 7 Cowen, 179. in a discussion of the decided cases for the purpose of seeing how far the remarks in them were capable of being harmonized. See *Ibid*, p. 523. Defendants' counsel cannot expect us to give it more credit than he would have us give to *Hardy v. Waters*, 38 Maine, 450, against which he so stoutly contends.

II. But this last-named case was, we think, rightly decided, and it stamps as inaccurate and unsound all *dicta* or decisions (if such there be) which hold all acts done and contracts executed by an infant through the intervention of an agent void, and, on the contrary, relegates the appointment of agents (for certain purposes at least) by them to the class of voidable contracts to be disposed of by the rules

applicable to that class. And it recognizes the cardinal principle that in relation to all voidable acts and contracts, infancy is a personal privilege which no one but the infant or his legal representative is entitled to assert.

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The exceptions must be sustained.

Nonsuit set aside. New trial granted.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and SYMONDS, JJ., concurred.<sup>1</sup>

### WELCH v. BUNCE ET AL.

83 IND. 382.—1882.

Howk, J. In this case the appellees, the plaintiffs below, sued the appellant as defendant, in a complaint of a single paragraph, of which the following is a copy:

"Comes now Nancy Bunce, by her next friend, Samuel Bunce, and Samuel Bunce, and complaining of the defendant says: That on the 22d day of January, 1878, she was the owner of the following real estate in Huntington county, Indiana, to wit: [*Here follows a description of the land.*] which was her sole and separate estate, having been inherited by her from her deceased father, Andrew Branstrator; that on said day plaintiff and her husband, Samuel Bunce, joining with her, made a conveyance of said real estate to defendant, and delivered said deed to said grantee; that at the time of executing said conveyance this plaintiff was a minor, under the age of twenty-one years, and is yet; that on the 25th day of October, 1879, she repudiated and disaffirmed said conveyance; that said conveyance was duly recorded in deed record book 41, page 313, of the records of Huntington county, on the 1st day of May, 1879; that said Samuel Bunce is the husband of said Nancy Bunce; wherefore she asks that said deed be set aside, and the title to said land be quieted in her, and for possession of the property in suit, to preserve the rents and profits, costs, and all proper relief."

To this complaint the appellant demurred upon the following grounds of objection: "1. The complaint does not state facts sufficient to constitute a good cause of action; and, 2. Defect of parties plaintiffs; Samuel Bunce is joined with his wife." This demurrer was overruled by the court, and to this ruling the appellant excepted and refused to plead further. Thereupon the court rendered judgment for the appellee Nancy Bunce, as prayed for in the complaint.

<sup>1</sup> In *Lansing v. R. R.*, 126 Mich. 663, it was held that an infant could not disaffirm until majority, a contract of compromise of a claim for personal injuries.

In this court the appellant has assigned as errors the following decisions of the Circuit Court:

1. In overruling his demurrer to appellee's complaint; and,
2. In overruling his motion to require the appellees to substitute a responsible next friend, or to remove Samuel Bunce as such next friend, on the showing made by the appellant.

Under the first of these alleged errors the principal question presented for decision is this: Can an infant disaffirm his or her conveyance of real estate during infancy, or before he or she arrives at the full and lawful age of twenty-one years?

This action was commenced on the 3rd of November, 1879; and it was alleged in the complaint then filed that the appellee Nancy Bunce was then "a minor, under the age of twenty-one years," and that she had disaffirmed her conveyance of the real estate to the appellant, on the 25th of October, 1879, preceding the commencement of this suit. It is clear, therefore, that the question above stated is fairly presented for decision by the demurrer to the complaint. We are of the opinion that the question stated must be answered in the negative. It would seem to be settled by the decisions of this court, that an infant cannot disaffirm or avoid his or her conveyance of real estate, simply on the ground of infancy, which is the only ground relied upon in the case at bar, until his or her arrival at majority. *Chapman v. Chapman*, 13 Ind. 396; *Miles v. Lingerman*, 24 Ind. 385; *Law v. Long*, 41 Ind. 586.

For the appellees' counsel, as we understand their argument, concede that the rule of law, on the subject under consideration, was formerly as we have stated it. But counsel claim that this rule was changed by the provisions of section 10 of the Civil Code of 1852, and that this section has been overlooked by this court in its more recent decisions on the subject of the rule. This section 10 provides as follows: "When an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age." 2 R. S. 1876, p. 37; section 12, Civil Code of 1881; section 255, R. S. 1881.

We are of the opinion, however, that the section quoted has no application to the question under consideration, and, therefore, makes no change in the rule of law in relation thereto. An infant has no right of action as to lands conveyed away by him or her, simply on the ground of infancy, until such conveyance has been disaffirmed or avoided. An infant's conveyance of real estate is not void, but is merely voidable; and it cannot be avoided or disaffirmed, simply on the score of infancy, until the infant has arrived at majority. It



seems to us, therefore, that the facts stated in the complaint, in the case now before us, showed clearly that the appellee Nancy Bunce had no right or cause of action against the appellant, at the commencement of this suit, and that the demurrer to the complaint, for the want of sufficient facts, ought to have been sustained.

Some other points, of minor importance, are noticed, rather than discussed, by the appellant's counsel. We deem it unnecessary for us to consider or decide these points, as the judgment must be reversed for the reasons already given.

The judgment is reversed, with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.<sup>1</sup>

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<sup>1</sup> "The deed of an infant cannot be avoided until he becomes of age, though he may enter and take the profits in the meantime. But it seems that a sale and manual delivery of chattels by an infant may be avoided while under age. Bac. Ab. Infancy and Age, 1; Com. Dig. *Enfant*, c. 4, 5, 9; F. N. B. 192; *Roof v. Stafford*, 7 Cowen, 179; 9 Id. 626. Some of the old books say that an infant may avoid his deed by entry before he comes of age; but that is not the doctrine of the present day. He may enter while within age and take the profits until the time arrives when he has a legal capacity to affirm or disaffirm the deed, but the deed is not rendered utterly void by the entry; it may still be confirmed after he arrives at full age."—BRONSON, J., in *Bool v. Mix*, 17 Wend. (N. Y.) 119, 132 (1837).

## 2. AVOIDANCE AFTER MINORITY.

GOODNOW *v.* EMPIRE LUMBER CO.

31 MINN. 468. — 1884.

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act of disaffirmance in case they then had the right to disaffirm — and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed, — there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21, 1863, and, as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold and control the property, ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died, she was free of the disability of infancy, and for one year and four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so; and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that, even if the period of minority of plaintiffs were to be excluded, (and we doubt if it should be), there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after the minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not, (where there are no circumstances other than the lapse of time and silence), and that he is not barred by mere acquiescence for a shorter period than that prescribed in the Statute of Limitations. The following are the

principal cases so decided: *Vaughan v. Parr*, 20 Ark. 600; *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Me. 236; *Prout v. Wiley*, 28 Mich. 164; *Youse v. Norcum*, 12 Mo. 549; *Norcum v. Gaty*, 19 Mo. 65; *Peterson v. Laik*, 24 Mo. 541; *Baker v. Kennett*, 54 Mo. 82; *Huth v. Car. Mar. Ry. & Dock Co.*, 56 Md. 202; *Hale v. Gerrish*, 8 N. H. 374; *Jackson v. Carpenter*, 11 Johns. 539; *Voorhies v. Voorhies*, 24 Barb. 150; *McMurray v. McMurray*, 66 N. Y. 175; *Lessee of Drake v. Ramsay*, 5 Ohio, 252; *Cresinger v. Lessee of Welsh*, 15 Ohio, 156; *Irvine v. Irvine*, 9 Wall. 617; *Ordinary v. Wherry*, 1 Bailey, 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: *Holmes v. Blogg*, 8 Taunt. 35; *Dublin & W. Ry. Co. v. Black*, 8 Exch. 181; *Thomasson v. Boyd*, 13 Ala. 419; *Delano v. Blake*, 11 Wend. 85; *Bostwick v. Atkins*, 3 N. Y. 53; *Chapin v. Shafer*, 49 N. Y. 407; *Jones v. Butler*, 30 Barb. 641; *Kline v. Beebe*, 6 Conn. 494; *Wallace v. Lewis*, 4 Harr. 75. 80; *Hastings v. Dollarhide*, 24 Calif. 195; *Scott v. Buchanan*, 11 Humph. 467; *Hartman v. Kendall*, 4 Ind. 403; *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 Vt. 368; *Harris v. Cannon*, 6 Ga. 382; *Cole v. Pennoyer*, 14 Ill. 158; *Black v. Hills*, 36 Ill. 376; *Robinson v. Weeks*, 56 Me. 102; *Little v. Duncan*, 9 Rich. (S. C.) Law, 55.

The rule holding certain contracts of an infant voidable, (among them is conveyance of real estate), and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in *Wallace v. Lewis*, "a dangerous weapon of offence, instead of a defence." For we cannot assent to the reason given in *Boody v. McKenney* (the only reason given by any of the cases for the rule that long acquiescence is not proof of ratification), "that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily." The existence of such an infirmity in one's title as the

right of another at his pleasure to defeat it, is necessarily prejudicial to it; and the longer it may continue, the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is, of course, an injury to the owner of it; one possessing such a right is bound, in justice and fairness towards the owner of the title, to determine without delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That ten, fifteen or twenty years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule, which is solely protection to the infant. Reason, justice to others, public policy, (which is not subserved by cherishing defective titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. *Cochran v. Toher*, 14 Minn. 293 (385); *Derosia v. W. & St. P. R. Co.*, 18 Minn. 119 (133). Three years and a half, the delay in this case (excluding the period of plaintiffs' minority), after the time within which to act had commenced to run, was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified.

Order reversed.

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### STRONG, J., IN *SIMS v. EVERHARDT*.

102 U. S. 300, 309.—1880.

THE question now is, whether Mrs. Sims did disaffirm her deed within a reasonable time after she attained her majority.<sup>1</sup> What is

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<sup>1</sup> Mrs. Sims disaffirmed her deed about one month after she was divorced.



a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case. *State v. Plaisted*, 43 N. H. 413; *Jenkins v. Jenkins*, 12 Iowa, 195, and numerous other cases. It must be admitted that generally the disaffirmance must be within the period limited by the Statute of Limitations for bringing an action of ejectment. A much less time has in some cases been held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable.

Now, in this case, though there was no disaffirmance for nearly twenty-one years after Mrs. Sims attained her majority, there were very remarkable reasons for the delay, sufficient, in our opinion, to excuse it. When the deed was made she was laboring under a double disability,—infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the Statute of Limitations, to sue until both the disabilities had ceased; that is, until after 1870. It is an acknowledged rule that when there are two or more co-existing disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden, Vendors, 103, 482; *Mercer's Lessee v. Sheldon*, 1 How. 37. This is the rule under the Statute of Limitations. But Mrs. Sims could not sue until after her divorce, and until the right the husband acquired by his marriage terminated. And had she given notice during her coverture of disaffirmance of her deed, it was in the power of her husband to disaffirm her disaffirmance. 2 Bishop, Married Women, sec. 392. Giving notice, therefore, which was all she could do, would have been a vain thing. The law does not compel the performance of things that are vain. Mr. Bishop, in his work to which we have referred, says that if an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. Sec. 516. In support of this he refers to *Dodd v. Benthall*, 4 Heisk. (Tenn.) 601, and *Matherson v. Davis*, 2 Coldw. (Tenn.) 443. These cases certainly sustain the rule stated in the text. In the former it was decided that an infant, who is also a married woman, has the option to dissent from her deed within a reasonable time after her coverture, though her coverture may continue more than twenty years. And if this were not so, the disability of coverture, instead of being a protection to the wife, as the law intends it, would be the contrary. We have found no decision

that is in conflict with this doctrine, and no *dicta* even, except those in *Scranton v. Stewart*.<sup>1</sup> And why should the rule not be thus? The person who takes a deed from an infant *feme covert* knows that she is not *sui juris*, and that she will be under the control of her husband while the coverture lasts. He is bound to know, also, that she has the disability of infancy. He assumes, therefore, the risk of attending both those disabilities.

But the continued coverture of Mrs. Sims, after she attained full age, is not the only circumstance of importance to the inquiry whether she disaffirmed her deed within a reasonable time. The circumstances under which the deed was made are to be considered. There is evidence that she was constrained by her husband to execute the deed; that his conduct toward her was abusive, violent, and threatening, in order to induce her to consent to the sale; that she was intimidated by him; that a look from him would make her do almost anything, and that she was in a weak and nervous condition. It is not strange that a woman bound to such a husband should delay during her coverture disaffirming a contract which he had forced her to make.

Add to this, that she had very little opportunity to disaffirm until after her divorce. Before she had reached her majority she removed to another state, and never returned to the neighborhood of the property to reside. Between 1848 or 1849 and 1870 she made but two visits to Laporte, both on account of sickness or the death of a relative, and neither visit was prolonged beyond three days. It is not a case, therefore, of standing by after she became of age and seeing her property in the enjoyment of another.

And again, she never did any act after her deed was made and after she became of age, expressive of her consent to it or implying an affirmance of the contract. The most that is alleged against her is that she was silent during her coverture. But silence is not necessarily acquiescence.

We are aware that the decisions respecting the disaffirmance of an infant's deed are not in entire harmony with each other. While it is generally agreed that the infant to avoid it must disaffirm it within a reasonable time after his majority is attained, they differ as to what constitutes disaffirmance and as to the effect of mere silence. Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after his reaching majority until he is barred by the Statute of Limitations, and that silent acquiescence for any period less than the period of limitation is not

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<sup>1</sup> 52 Ind. 68.

a bar. Such was in effect the ruling in *Irvine v. Irvine*, 9 Wall. 617. See also *Prout v. Wiley*, 28 Mich. 164,<sup>1</sup> a well-considered case, and *Lessee of Drake, v. Ramsey*, 5 Ohio, 251. But, on the other hand, there appears to be a greater number of cases which hold that silence during a much less period of time will be held to be a confirmation of the voidable deed. But they either rely upon *Holmes v. Blogg*, 8 Taunt. 35, which was not a case of an infant's deed, or subsequent cases decided on its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee has made valuable improvements, or making use of the consideration for the deed. We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence, continued for a period less than that prescribed by the Statute of Limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed. And those confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint of disability.

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<sup>1</sup> "Upon this question of the affirmance of a deed executed during minority, by mere lapse of time or, in other words, by mere silence or acquiescence for any particular period of time, after the minor has attained his majority, it is sufficient, without citing and analyzing authorities, to say that, by the great weight of authority, both English and American, such delay or acquiescence, without any affirmative act indicating an intention to affirm, or tending to mislead the grantee into a belief of such intention, or any circumstances of equitable estoppel, such as standing by and seeing improvements made or money expended, or a sale of the property to another, without asserting his claim (or some such special circumstance), will not operate as an affirmance or confirmation of the deed executed during minority, nor prevent the minor from disaffirming it and reclaiming the land at any time allowed him by the statute of limitation for bringing an action. The question, in such a case, is substantially but a question of the time within which an action may be brought; and the legislature having fixed the time which to them seemed reasonable for this purpose it is not within the power of the judiciary to change it. But when facts exist which create an equitable estoppel, as above intimated, or some other special circumstances such as are above alluded to, so that the question ceases to be one merely of the length or lapse of time, it may perhaps be very proper to hold, as many cases have held, that the infant should manifest his purpose to disaffirm within a reasonable time; and what should be held to be a reasonable time might depend much upon the special circumstances of the particular case.

"This distinction reconciles nearly, though not quite, all of the decisions upon this subject."—*Prout v. Wiley*, 28 Mich. 164, 167.

In view of these considerations, our conclusion is that Mrs. Sims, the complainant, having been a *feme covert* until 1870, and never having done, during her coverture, any act to confirm the deed which she made during her infancy, could effectively disaffirm it in 1870, when she became a free agent, and that her notice of disaffirmance and her suit avoided her deed made in 1847.

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## NORTH WESTERN R'Y *v.* M'MICHAEL.

### THE B. L. AND C. J. RY. *v.* PILCHER.

5 EXCH. (ENG.) 114.—1850.

THE case of the *Birkenhead, Lancashire and Cheshire Junction Railway Company v. Pilcher*, was an action of debt for calls. The declaration stated that the defendant was and still is the holder of divers, to wit, 180, shares in the said company, and being such holder, was and still is indebted to the said company in a large sum of money, to wit, £300, in respect of a call made on the said shares; whereby, etc., an action hath accrued to the plaintiffs, by virtue of the companies clauses consolidation act, 1845, and the Birkenhead, Lancashire and Cheshire Railway act, 1846, to demand from the defendant the said sum, etc.

Plea, that at the time when he, the defendant, first became and was the holder of the said shares, and at the time of the making and entering into by him, the defendant, of the contracts, by the force, virtue and in pursuance of which the debts, causes of action and liabilities, and each and every of them, in the said declaration mentioned, have accrued to the plaintiffs and been incurred by the defendant, as in the said declaration is alleged, and at the time of the making and entering into by him, the defendant, of the contracts by the force, virtue, and in pursuance of which the plaintiffs claim to be entitled by law to make the said call upon the defendant, and to demand and have the amount of the same of and from the defendant, in manner and form as in the said declaration is alleged, he, the defendant, was an infant, within the age of twenty-one years.—Verification.

Replication, that the defendant, at the time when he first became and was the holder of the said shares in the said declaration mentioned and at the time of the making and entering into by him, the defendant, of the said contracts, and every of them, in the said plea mentioned, was of the full age of twenty-one years, and not



within the age of twenty-one years, to wit, of the age of nineteen years. Conclusion to the country and issue thereon.

A verdict was entered for the defendant on this issue, pursuant to leave reserved at the trial.

In the *Railway v. M'Michael*, the plea to the first count was infancy; and "that the defendant has never ratified or confirmed the said application grant, entry and proprietorship, or any or either of them, but the same have, and each and every of them hath, hitherto always remained wholly unratified and unconfirmed. That the defendant has not at any time derived any profit, benefit and advantage whatsoever from the said shares," etc.—Demurrer.

The judgment of the court in both of the above cases was, on the 11th of January, 1851, delivered by

PARKE, B. The question to be decided in the case of the *North Western Railway Company v. M'Michael* is, whether the first plea (the second to the second count being identical) contains a good *prima facie* answer to the declaration. If the effect of a person actually becoming a shareholder in a railway company, by original agreement with the company, ought to be treated as a mere contract with those to whom the proposal was made, for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessities, are, not binding on the infant at all; and the simple fact that the defendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants, having become shareholders in railway companies, have been held liable to pay calls made whilst they were infants. *Cork and Brandon Railway Company v. Cazenove*, 10 Q. B. 935; *Leeds and Thirsk Railway Company v. Fearnley*, 4 Exch 26. They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent (21 Hen. 6, 31 B.) in the case of a lease rendering rent, and

to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted, (*Evelyn v. Chichester*, 3 Burr. 1717), unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so. Bac. Abr. "Infancy and Age," (1) 5; Co. Litt. 380. This court accordingly held, in *The Newry and Enniskillen Railway Company v. Coombe*, 3 Exch. 565, that an infant who did avoid the contract of purchase during minority, was not liable to pay any calls. In the subsequent case of *The Leeds and Thirsk Railway Company v. Fearnley*, 4 Id. 26, where there had been no waiver or repudiation of the purchase, we held, in conformity with the decision of the Queen's Bench, that the defendant continued liable. We cannot say that we concur in the opinion of that court, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that all shareholders, including infants, are by the operation of the railway acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favor of infants and lunatics in statutes containing general words (*Stowell v. Lord Zouch*, Plowd. 364), though that depends, of course, on the intent of the legislature in each case (see Wilmot's Notes of Opinions and Judgments, p. 194, *The Earl of Buckinghamshire v. Drury*), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them, against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest; he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. (See Bac. Abr. "Infancy and Age," [1] 8). The law is clearly laid down in Co. Litt. 2b: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and, at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a railway company, or other chartered corporation, is not thereby made a holder of real estate: *Bligh v. Brent*, 2 Y. & C. 268;

for all real estates are vested in the corporate body, not in the individuals composing it; but the shareholder acquires, on being registered, a vested interest of a permanent character, in all the profits arising from the land, and other effects of the company, and, when registered, may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby becomes a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground we think the plea in the case of *The Birkenhead Railway Company v. Pilcher*, which we have to consider with this, bad, notwithstanding the verdict, and, therefore, are of opinion that the rule should be absolute to enter up judgment for the plaintiffs in that case, notwithstanding the verdict entered for the defendant.

But the case of *The North Western Railway Company v. M'Michael* contains, besides the averment of infancy at the time of the contracts for the shares, other special facts—not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase. This case is one of more difficulty.

The law upon this subject is to be found as early as 21 Hen. 6, 31 B, where it was held by Newton, J., that, if an infant lessee takes possession, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownlow, 120, as *Ketley's Case*; Cro. Jac. 320, as *Kelsey's Case*; 2 Bulst. 69, as *Kirton v. Elliott*; and in Roll. Abr. 731, as *Kettle v. Eliot*. The case is most fully reported in Brownlow. It was an action of debt for rent; the defendant pleaded his infancy at the time of the lease made, in bar; and it was argued, on demurrer to the plea, that the defendant should be charged because by the lease made he is become a purchaser, and so to be, in judgment of law, as a man of full age.

We collect that the principle upon which the court decided was, that, every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bac. Abr. "Infancy," (I) 8, treats the infant as being bound by reason of acquiescence after full age. How

that could be collected from the reports of the case is not clear; and so Lord Ellenborough, in *Baylis v. Dineley*, 3 M. & S. 481, intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that, if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority.

But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one, is an answer, the estate still being vested in the infant. We are disposed to think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though the defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the *case of Ketley*, as reported in Bulstrode, Haughton, J., expressing an opinion, that if the lease was for an acre at £100 per annum, and the infant occupy and enjoy it, he is to be charged with the rent, he being here taken to be a purchaser; but Dodderidge said, that if a greater rent was reserved than the land was worth, that then, peradventure, the infant should not be charged. This opinion is more strongly expressed in the report in Brownlow. This is certainly a point of some nicety; but the question may be asked, why, in such a case, does not the infant disagree to and avoid the purchase, and so get rid of the obligation? and is it reasonable, that he should retain the estate and prevent the owner from having any use of it, and not be liable to the burthen, though disproportionate? It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the meantime, he ought to be at liberty, or his guardian for him, to get rid of the liability, by showing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his majority, for then, clearly, he ought to disclaim it, and thereby give back the estate; and to make such a plea good, where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The plea, as it stands, is by no means free from doubt. We think, however, the more reasonable view of the case is, that the infant, even in the



case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed,—at all events, unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the company from having it, and dealing with it as their own, without being liable to bear the burden attached to it. For these reasons we think the plea is bad, and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

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3. WHAT CONSTITUTES AVOIDANCE.

SINGER MANUFACTURING COMPANY *v.* LAMB.

81 MO. 221.—1883.

MARTIN, C. This was a suit to foreclose a mortgage conveying 640 acres of land, and was instituted against the mortgagor and all other persons interested in the land by conveyance under him. The controversy which comes before us, relates to only eighty acres of the mortgaged land, claimed by Isaac N. Lamb, who is the appellant, from the decree of foreclosure as to this parcel. The pleadings were sufficient to embrace the issues contained in the evidence, and need not be recited.

On the 14th day of February, 1876, W. W. Chenault executed and delivered to the plaintiff a mortgage on the whole 640 acres. At this time he was a minor, under the age of twenty-one years. On the 26th day of July, 1876, while he was still a minor, he executed and delivered to one Leroy Moore, a warranty deed to eighty acres of the mortgaged tract for a consideration of \$350. On the 17th day of November, 1876, said Moore, by warranty deed, conveyed the same parcel of eighty acres to Isaac N. Lamb, defendant, for a consideration of \$400. On the 25th day of March, 1879, and after the mortgagor had attained his majority, he executed and delivered to the defendant, Lamb, a quit-claim deed for the same parcel of eighty acres. On the 2nd day of April, 1880, the mortgagor executed and delivered to plaintiff a deed affirming the mortgage deed as to all the land conveyed by it.

The deed made by the mortgagor to Leroy Moore, while he was still a minor, could not constitute a disaffirmance of the mortgage deed previously made during his minority. If his quit-claim deed to the defendant Lamb, after he had reached his majority, was

effective in disaffirming the mortgage deed, as to the land in controversy, then the subsequent deed of affirmance of the mortgage deed, as to the same land, could have no effect in giving it to the plaintiff or preserving it in its security. Thus the sole question necessary for us to consider is, whether the quit-claim deed operated as a disaffirmance of the mortgage deed as to this parcel of land. This is the only point presented by counsel on both sides.

The deed of a minor is not void, but only voidable, after he reaches his majority. *Peterson v. Laik*, 24 Mo. 541; *Huth v. Corondelet, etc.*, 50 Mo. 202. The right to disaffirm may be exercised by his heirs and representatives within the time permitted to him for doing the act. *Ill., etc., Co. v. Bonner*, 75 Ill. 315. It requires no affirmative act to continue its validity, but only an absence of any disaffirming acts. It remains valid in all respects, like the deed of an adult, until it has been disaffirmed by the maker, after reaching his majority. The ancient doctrine which required the disaffirming act to be of as high and solemn a character as the act disaffirmed has no place in modern law. The disaffirming act need take no particular form or expression. *Allen v. Poole*, 54 Miss. 323; *White v. Flora*, 2 Overton (Tenn.) 426; *Phillips v. Green*, 5 T. B. Monroe, 344. The deed of a minor may be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument. If the minor after reaching his majority, has expressly repudiated his deed, there remains nothing for construction. But when the disaffirmance proceeds from the acts of the minor, after reaching majority, they must, in their nature, imply a repudiation of the voidable instrument. If they are consistent with the continued existence of such instrument, there is no disaffirmance, and the deed remains unaffected. *Leitendorfer v. Hempstead*, 18 Mo. 269; *Ill. Land Co. v. Beem*, 2 Ill. App. 390; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *McGan v. Marshall*, 7 Humph. 121.

In applying this controlling principle, it has been held, that an absolute conveyance by a minor is necessarily avoided by a subsequent absolute conveyance of the same land, after majority, to a third person. *Youse v. Norcoms*, 12 Mo. 550; *Norcum v. Sheahan*, 21 Mo. 25; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 123.<sup>1</sup> The effect of the disaffirming act

<sup>1</sup> "The deed of an infant is voidable, and must be avoided before the action will lie; but when properly avoided no other thing is necessary to be done before bringing suit. The necessity for the infant to make entry before giving the deed of avoidance, or before bringing suit, does not exist in this state. Title by descent, and our mode of transferring title by deed, are regulated by statute. The old common-law doctrine of feoffment with livery of seizin does not consti-

must depend greatly upon the nature and effect of the act claimed to have been disaffirmed. It has been held that a subsequent mortgage, after majority, does not necessarily avoid a prior one made during minority. *McGan v. Marshall*, 7 Humph. 121. Two deeds to different persons, purporting to convey the absolute title to a parcel of land, cannot stand together any more than two bodies can occupy the same space. They are necessarily inconsistent. But this is not necessarily the case with two mortgages. The second one takes effect on the equity of redemption, and there may be value enough in the real estate to satisfy both. And upon the same reasoning it has been held, that a subsequent deed purporting simply to convey "all the undivided moiety of all those certain lots," would not operate as a disaffirmance of a prior mortgage on the same property made by the grantor during minority. It was held that the obvious intent of such a conveyance, in the absence of any expression to the contrary, was to vest the title in the grantor, subject to the prior mortgage. *Palmer v. Miller*, 25 Barb. 399. It has been held, that a subsequent conveyance, with covenants of warranty, would be inconsistent with a prior mortgage, and would operate as a disaffirmance of it. *Dixon v. Merritt*, 21 Minn. 196. But, however the law may be in these cases noticed by me for illustration, I am convinced that a subsequent quit-claim deed cannot, either on principle or authority, be accepted as a disaffirmance of a prior mortgage. The two instruments are consistent with each other, and can stand together. The quit-claim purports to convey only the estate remaining in the grantor at the time of its execution. In operating on this estate as it existed, it carried it to the grantee subject to the mortgage. The right to disaffirm the mortgage was a personal privilege of the grantor, and could not be considered as an inherent part of the title transferred. *Hoyle v. Stowe*, 2 Dev. & Bat. (Law) 320. It could not be regarded as passing to an assignee, in the absence of express language to that effect, so

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tute any part of our law of conveyancing. Our registry laws supply their place, and furnish the notoriety of transfer intended to be given by that ancient mode of passing title; and the making and recording of the second deed in this case was entirely sufficient. How. St. Ch. 216, §§ 5652, 5657; 1 Pars. Cont. (3rd ed.) pp. 373, 374; *Eagle Fire Co. v. Lent*, 6 Paige, 635; *Cresinger v. Welch*, 15 Ohio, 192; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124; *Hoyle v. Stowe*, 2 Dev. & B. (Law), 320; *Tucker v. Moreland*, 10 Pet. 58; Bingham on Infancy, 60; *Dixon v. Merritt*, 21 Minn. 196; *McGan v. Marshall*, 7 Humph. 121; *Peterson v. Laik*, 24 Mo. 541; *Drake v. Ramsay*, 5 Ohio, 252; *Hastings v. Dollarhide*, 24 Cal. 195; *Pitcher v. Laycock*, 7 Ind. 398; Laws 1881, p. 385; *Crane v. Reeder*, 21 Mich. 82; *Prout v. Wiley*, 28 Mich. 164."—*Haynes v. Bennett*, 53 Mich. 15, 17 (1884).

long as the grantor remained in being to exercise it himself. Neither do I perceive how a deed which is entirely consistent with the mortgage, and does not in its nature or language purport to disaffirm it, can be construed as sufficient to carry to the grantee, the personal privilege of the grantor to disaffirm it, in the absence of apt words indicating an intention to convey or surrender the privilege. The fact that the grantee in the quit-claim had actual, as well as constructive, knowledge of the existence of the mortgage, and paid no valuable consideration for the quit-claim, could add nothing to the strength of his position; and for that reason not be considered. Our opinion is that the decree was without error and should be affirmed. It is so ordered.

All concur, except NORTON and SHERWOOD, JJ., absent.

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### CHAPIN *v.* SHAFER ET AL.

49 N. Y. 407.—1872.

THE action was brought to recover possession of a horse.

Defendants denied plaintiff's title and claimed title in themselves.

PECKHAM, J. One George Chapin, an infant, being indebted to the defendants for the balance of an account for three suits of clothes, one for himself and two for others, gave them a chattel mortgage upon a horse, to be void in case he paid \$110 in ninety days from the 20th of January, 1868. On the same day he sold the horse to this plaintiff and delivered it to her. He refused to deliver the horse on the mortgage to the defendants. When the mortgage was due, the defendants took the horse from plaintiff's possession, and she brought this action therefor. In August thereafter, directly after George Chapin became of age, he ratified the bill of sale to plaintiff by writing indorsed thereon.

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Assuming that the mortgage is voidable only, then the mortgagor had a right to avoid it at any time before he arrived at age, and within a reasonable time thereafter, by any act which evinced that purpose (*Bool v. Mix*, 17 Wend. 119; *Stafford v. Roof*, *supra*; *State v. Plaisted*, 43 N. H. 413), and an unconditional sale of the property is such an act.

I think the sale to this plaintiff on the same day the mortgage was executed, and the delivery of the horse to her, was such a sale.

True, the terms of the sale were all the vendor's "right, title and interest," in the property, but afterwards came a covenant "to war-



rant and defend the sale of said goods and chattels, hereby made unto the said Eliza, against all and every person whomsoever."

The bill of sale embraced many other chattels of the vendor, and these words therein were obviously intended to convey the chattels absolutely. Taking the whole instrument together, it was an unconditional sale with warranty. Such is its manifest purpose. The covenant of warranty so in substance speaks. The cases referred to by the appellants' counsel are all cases of real estate, where the rules of construction are different. In sales of personal property, warranty of title is always implied; not so as to real estate.

The mortgage is thus absolutely avoided.

Again, the ratification of the bill of sale after the infant's arrival at age was for a like purpose, treating it as a "bill of sale and assignment" of the property. The purpose to ratify this and to rescind the other is plain; no particular form of words was necessary. This avoided the mortgage. It was thus made void. The defendants' authority for taking the horse was gone. The defence was thereby struck out. I incline to think this operated to make the defendants trespassers from the beginning in taking the horse. Their title was never perfected. Before it ripened, it was extinguished by this dissent.

The order should be affirmed and judgment absolute for plaintiff.

All concur except FOLGER, J., not voting.

Judgment accordingly.

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#### 4. AVOIDANCE IN PART.

### WEED *v.* BEEBE ET AL.

21 VT. 495.—1849.

#### APPEAL from the Court of Chancery.

The Court of Chancery decreed, that the defendants pay to the orator the amount of the purchase money of the premises remaining unpaid, or surrender the premises; from which decree the defendants appealed.

POLAND, J. The facts in this case, as shown by the bill, answers and evidence, seem to be substantially the following. On the 17th day of February, 1843, the orator contracted to sell to Beebe and Orcutt certain premises in the town of Charleston, of which he was the owner, for the sum of \$300, — \$200 of which was to be paid by building a barn and finishing a house for the orator, and \$100 to be

paid in money, or by taking up a note for that sum, which John M. Beebe, father of Willard M., held against Jedediah Skinner; and on the same day the orator executed a deed of the premises to Willard M. Beebe, and Beebe and Orcutt executed to the orator a written obligation for the payment of the \$300, agreeably to their contract. Beebe and Orcutt, in pursuance of their contract, went on and performed, or nearly performed, the labor, which was to be in payment of \$200 toward the purchase, but neglected and refused to pay the remainder of the purchase money. Orcutt having absconded from the state, and being wholly insolvent, the orator commenced his suit against Willard M. Beebe, for the recovery of the \$100, returnable to the June Term of Orleans County Court, 1844; to which action the said Willard M. appeared and pleaded, that, at the time of the execution of the deed and contract aforesaid, he was a minor, under the age of twenty-one years, and, having established that fact, he defeated a recovery by the orator against him for said sum. After the determination of that suit, and after the said Willard M. became of full age, and on the 4th day of September, 1845, the said Willard M. conveyed the premises in question to Samuel S. Lang — Lang having full notice of the non-payment of the said \$100 of the purchase-money, and that Willard M. Beebe had avoided payment of it on the ground of infancy. Lang, at the time he received the deed from Willard M. Beebe, executed his notes, for the sum of \$130, to John M. Beebe, and also executed a mortgage of the premises to John M. Beebe, to secure the same. The orator also executed a quit-claim deed of the premises to Jedediah Skinner, on the 24th day of July, 1843.

There can be no doubt but that Willard M. Beebe, being a minor at the time of entering into the contract with the orator, might have disaffirmed the contract on coming of age; and had he done so, the orator probably could not have reclaimed the premises without paying back what he had received in part payment for the land. Whatever may be the law elsewhere, it is well settled in this state by the cases of *Bigelow v. Kinney*, 3 Vt. 353, and *Richardson v. Boright*, 9 Vt. 368, that an infant cannot avoid that part of his contract which binds him, without also avoiding that part which is in his favor. If he purchase land and execute notes for the purchase, or a mortgage of the land to secure the purchase-money, he cannot disaffirm the notes and mortgage and claim the land under his deed. So if he sell land and take notes, he cannot avoid his deed and compel payment upon his notes. And the good sense and equity of this doctrine is too apparent to require any reasoning, or authority to support it. In the present case the defendant Beebe paid a part of

the purchase money, but avoided the payment of the residue, by reason of his infancy.

It is strongly insisted in this case by the counsel for the defendants, however, that the orator could make no claim upon the land, or any lien upon it, by reason of this disaffirmance by Beebe, until he first repaid, or offered to repay, the \$200 he had already received. As before intimated, the orator probably would have been obliged to do this had Beebe disaffirmed his contract upon his coming of age, and claimed to be restored to his former condition in relation to the purchase of the premises. But this, it seems, he did not do; he not only affirmed the contract of purchase, by continuing in possession of the land, but even, after he had actually avoided the payment of the debt to the orator for the land, he proceeded to convey the land away to Lang. This, we think, must effectually preclude him from claiming any return of the sum he had previously paid. Under these circumstances it seems apparent to us that, upon the plainest principles of common honesty, as well as upon the principles of equity law, the orator should have a lien upon the premises, as against Willard M. Beebe, for that portion of the purchase-money, the payment of which he had avoided by his plea of infancy.

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The decree of the chancellor is therefore affirmed.

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5. AVOIDANCE A PRIVILEGE PERSONAL TO THE INFANT.

BOZEMAN ET AL. *v.* BROWNING ET AL

31 ARK. 364.—1876.

**APPEAL** from Clark Circuit Court in Chancery.

About the year 1836, John Browning, a resident of Alabama, furnished his son, Joseph A. Browning, a young man about eighteen years of age, with \$1,000, and sent him to Arkansas to purchase lands, directing him to take the title to the lands in his own name. It seems that, on the 5th of February, 1839, Joseph A. Browning, when still a minor, sold the lands to appellee, David M. Browning, an older brother, and gave him a bond for title, acknowledging the full payment of the purchase-money, \$2,500, and binding himself and his heirs to make him a good and lawful title to the lands by the 1st of September then following, when he would be over twenty-one years of age.

On the 10th of September, 1839, Joseph A. Browning made a brief will, by which, in general terms, he bequeathed all his property.

both real and personal (after payment of his debts), to his father, John Browning, during his natural life, and after his death to his mother, Nancy Browning, and, at the death of them both, to be equally divided between his brothers and sisters of the whole blood. He died on the 15th of September, 1839, in Talladega county, Alabama, where he resided previous to his death.

On the 4th of November, 1839, his will was probated before the Orphans' Court of Talladega county, Alabama, and his father, John Browning, was appointed administrator of his estate, with the will annexed, and qualified as such. On the 4th of November, 1839, the same day on which the will of Joseph A. Browning was probated, and his father appointed and qualified as administrator of his estate, David M. Browning filed a petition in the Orphans' Court of Talladega county, stating that, on the 5th day of February, 1839, he had purchased the Arkansas lands (describing them) of Joseph A. Browning; that John Browning had been appointed his administrator, etc., and prayed that he be ordered to come before the court and convey to petitioner, title to the lands described in the bond, according to the understanding of his testator, etc. On the 2d of March, 1840, the Orphans' Court ordered the deed to be made. On the 2d day of March, 1840, the same day on which the order was made, John Browning, administrator, etc., executed to David M. Browning a deed for the lands, in accordance with the order.

David M. Browning, and all persons holding under him, by conveyances, continued in possession of the lands until the commencement of this suit, 12th of January, 1870. The bill was filed on the chancery side of the Clark Circuit Court by Michael Bozeman, and wife, Lucy Ann, a sister of Joseph A. Browning, of the whole blood, and Gustavus A. Sessions and David May, sons of Elizabeth Browning, who was also a whole blood sister of Joseph A. Browning, and had died after having been several times married. The other living brothers and sisters of the whole blood of Joseph A. Browning, the heirs of such as were dead, and persons in possession of the lands, under successive conveyances from David M. Browning, were made defendants. The bill prayed that the lands be decreed to be the property of the plaintiffs, and defendants alleged to be the brothers and sisters, etc., of the whole blood of Joseph A. Browning, and for an account of rents and profits as against the defendants in possession of and claiming the lands. It seems that the brothers and sisters, etc., of Joseph A. Browning who were made defendants, declined to join as plaintiffs in the bill.

The cause was finally heard on the pleadings and evidence, the bill was dismissed for want of equity, and plaintiffs appealed.



ENGLISH, Ch. J. \* \* \* Appellants further alleged in the bill, that, if mistaken in the averment that the bond for title was a fabrication, etc., Joseph A. Browning was an infant, under the age of twenty-one years, when he executed the bond, and that the Orphans' Court of Talladega county, Alabama, was without jurisdiction to decree specific performance, etc. The answers admit that Joseph A. was under age when he made the bond. It appears that he lived about twenty-five days after he was of age. The bond for title was not void, because of the infancy of the obligor. Modern decisions have established the rule, that an infant's contracts are none of them absolutely void, that is, so far void that he cannot ratify them after he arrives at the age of legal majority. *Vaughan, Adm'r, v. Parr*, 20 Ark. 608. The sale of the lands seems not to have been improvident. It was made in accordance with the wishes, and with the approbation of the father, and it is not shown that the price paid for the lands was not a fair one.

As a general rule, no one but the infant himself, or his legal representatives, executors and administrators, can avoid the voidable acts, deeds and contracts of an infant, for while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit; and, when dead, they alone should interfere who legally represented him. *Gullett and Wife v. Lamber-ton*, 6 Ark. (1 Eng.) 118; 1 Parsons on Contracts, 329; Tyler on Inf. and Cov. 59.

It does not appear that the contract in question was disaffirmed by the infant, after he was of age. There is no inconsistency between his will and the bond for title. The will makes no reference to the Arkansas lands described in the title bond. The deviser devised, in general terms, his real and his personal property. It is shown that he owned both real and personal property in Alabama, at the time he made his will; and there is some evidence that he expressed a desire, during his last illness, to make a deed to his brother, David M., for the Arkansas lands, which he had sold and contracted to convey to him, but was restrained by his physician, who advised him to be quiet, and not be disturbed with business transactions, which might prove detrimental to him.

Had he expressly devised the Arkansas lands, it would, perhaps, have been a disaffirmance of the previous contract of sale, made while he was an infant. *Hoyle v. Stowe*, 2 Dev. & Batt. 322; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 249.

The administrator of Joseph A. did not, certainly, disaffirm the contract; on the contrary, so far as he could, he affirmed it. He submitted, without objection, to the jurisdiction and order of the

Orphans' Court directing him to make a deed to David M. Browning, in accordance with the bond for title. He executed the deed, brought it to Arkansas, and delivered it to David M. Browning, who was then in possession of the lands under the bond for title. He set up no claim to the lands, during his lifetime, as devisee under the will. It seems that he sold the Alabama lands to Joseph A., and that the remainder devisees under the will made quit-claim deeds to the purchaser. There is some evidence that he brought the negro woman which David M. let Joseph A. have in part payment of the lands, to Clark county, and sold her, and that at some time after his death, so much of Joseph's estate as remained was distributed to his devisees.

The appellants attempted by their bill, after the lapse of over thirty years, to disaffirm the bond for title, on the ground of Joseph's infancy, and to recover the lands from his vendee, and those holding under him, claiming the lands, as remainder devisees, under general expressions of his will. The rule seems to be, that the privilege of disaffirming an infant's contract extends to his legal representatives, after his death, or his privies in blood, entitled to the estate upon avoidance of the contract, but not to his surety, endorser, or any strangers, or his assignee, or other privy in estate only. 1 Chitty on Contracts, 11 American ed., p. 222, note (o). The rule would extend, says Mr. Tyler (Inf. and Cov. p. 59), to privies in blood of the infant, but not to his assignees or privies in estate only.

The appellants, in their bill, claim the lands not as the heirs or privies in blood of the infant, but solely as devisees under his will, and they claim to exclude all others, except his brothers and sisters, of the whole blood, and their descendants. In other words, they claim as devisees under the will, as any stranger might do, if a devisee, though not an heir or privy in blood. They place themselves, in their bill, on the ground only of privies in estate.

Had Joseph died intestate, possibly his Arkansas lands might have gone to his father, who furnished the money to purchase them, and, on his death, to the heirs of the father generally; but, if the lands were a new acquisition, they would have gone to the father for life, and in remainder to the collateral kindred of Joseph. Gantt's Digest, sec. 2161; *Kelly's Heirs et al. v. McGuire et al.*, 15 Ark. 555.

David M. Browning paid for the lands, took the bond for title, and went into possession of the lands under it. Had Joseph A. lived, he would have been obliged to disaffirm the contract within the period of limitation, which commenced running at his majority,

or his right to disaffirm would have been barred. He certainly could not have maintained this bill, after the lapse of thirty years, to disaffirm the contract, and recover the lands of his vendee, and his grantees; and the statute having commenced running against him during his lifetime, we do not see that appellants, who claim under his will, are in any better condition than he would have been, had he lived and brought the bill himself. *Cresinger v. Lessee of Welch*, 15 Ohio, 195; *Hughes v. Watson*, 10 Ohio, 134; *Drake v. Ramsey*, 5 Ohio, 252, *Bool v. Mix*, 17 Wend. 119; *Blankenship et al. v. Stout*, 25 Ill. 132; *Tyler on Inf. and Cov.* 67. Moreover, had Joseph lived and brought this bill to disaffirm his contract, and recover the lands in apt time, the court would not have granted him the relief prayed, without his paying back to David M. Browning the purchase money which he paid him for the lands. Yet appellants, who claim the lands under Joseph's will, seek, by their bill, to disaffirm his contract and recover the lands, and do not tender or offer to refund any part of the purchase money. It was well said by Chancellor Kent, that the privilege of infancy is to be used as a shield, and not as a sword. 2 Kent's Com. 240; *Tyler on Inf. and Cov.* 77; *Strain v. Wright*, 7 Georgia, 570; *Jeffords' Adm'r v. Ringold et al.*, 6 Ala. 544 (in which it was also held that the executor or an administrator of an infant could ratify the contract of an infant, without any new consideration). *Badger v. Phinney*, 15 Mass. 359; 1 Parsons on Con. 320; *Womack, Adm'r, v. Womack*, 8 Texas, 597; *Bailey v. Barnberger*, 11 B. Mon. 113; *Weed v. Beebe et al.*, 21 Vt. 495.

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Upon the whole record, the decree of the court below, dismissing the bill for want of equity, is affirmed.

## 6. EFFECT OF AVOIDANCE, IN GENERAL.

### HOYT v. WILKINSON.

57 VT. 404.—1885.

**ASSUMPSIT** on a note. Heard on demurrer to the defendant's rejoinder, June Term, 1884, Veazey, J., presiding. Demurrer overruled, and judgment for the defendant. Pleas, general issue, Statute of Limitations, and infancy.

Rejoinder in part:

"Yet for rejoinder in this behalf the said defendant says that said promissory note in the first count of the said declaration mentioned was made and delivered by said defendant to one John B. Covey,

the original payee of said note, in respect of a contract of purchase of a certain horse by said defendant, of said John B. Covey, and in payment of said horse, on the 15th day of December, A. D. 1853, at Sandgate, aforesaid; and afterwards and before the said promissory note became due, and while the said John B. Covey held and owned said promissory note, and before the said defendant had attained the age of twenty-one years, to wit: on the first day of February, 1854, at Sandgate aforesaid, the said defendant did rescind and disaffirm said contract of purchase of said horse, and then and there did tender and offer to said John B. Covey the said horse so purchased of him as aforesaid, and then and there requested and demanded of said John B. Covey that he surrender and give up to said defendant the said promissory note. And that said John B. Covey then and there did refuse to receive said horse so offered and tendered as aforesaid, and did refuse to surrender and give up to said defendant the said promissory note so demanded as aforesaid."

ROWELL, J. An infant may avoid his contracts relating to personal property while under age and immediately. 1 Am. Lead. Cas. 258; *Price v. Furman*, 27 Vt. 268; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119, 132. The *dictum* to the contrary in *Farr v. Sumner*, 12 Vt. 31, is not sound, although not without some support in the authorities.

But what was the effect of the avoidance and tender here rejoined? It was, as between the parties, nothing else appearing, in the language of Chief Justice Shaw in *Boyden v. Boyden*, 9 Met. 519, to "annul the contract on both sides *ab initio*," and to divest the plaintiff of title to the note, and re-invest him with title to the horse. *Willis v. Twambly*, *supra*; *Badger v. Pinney*, 15 Mass. 359; 1 Am. Lead. Cas. 258, 259. *Willis v. Twambly* is exactly in point. There the plaintiff, a minor, had a non-negotiable note payable to himself, which he exchanged with Cook for a worthless watch. The next day, under the direction of his father, he disaffirmed the contract by tendering back the watch to Cook and demanding the note, which Cook refused to deliver, and also to take the watch. Subsequently the maker of the note, on being informed of the transaction and receiving a discharge from plaintiff's father, gave a new note in lieu of the old one, after which Cook passed the old note to B., assuring him it would be paid, and B. brought suit thereon against the maker in the plaintiff's name; and it was held that the note ceased to be the property of Cook from the time the plaintiff disaffirmed the contract, and that the settlement made by the defendant when he gave the new note discharged him from liability of the old note. The



case does not disclose what was done with the watch after it was tendered back, and no point was made of that by either court or counsel.

*Price v. Furman* is also much in point. There the minor tendered back the horse and demanded the property he had given in exchange for it, and on defendant's refusal to receive the horse or to re-deliver the property, the minor turned the horse loose into the highway and left it; but the court laid no stress on that fact, but said that when the contract was rescinded it could not be enforced, and that, on general principles, the minor could recover, as there had been an offer to return the horse, which was in his possession and under his control.

This is very analogous to the tender of specific articles in payment of a note or other contract, where a tender of the articles according to the contract vests the property in the promisee and discharges the debt; and the promisor is not bound to keep the property, nor to plead *uncore prist*. *Barney v. Bliss*, 1 D. Chip. 399.

Plaintiff contends that it is fairly inferable from the rejoinder that the defendant continued to keep the horse for such a length of time and in such a manner as to amount to a waiver of his avoidance, and an affirmation of the contract. But no such inference can fairly be drawn from the pleading. If plaintiff thought that point a good one, and desired to raise it, he should have sur-rejoined.

We find no error in the judgment below; but at the plaintiff's request, the same is reversed *pro forma*, and the cause remanded, with leave to plaintiff to replead on the usual terms.<sup>1</sup>

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7. EFFECT OF AVOIDANCE WHEN ACTION IS BROUGHT, BY THE ADULT, UPON THE AVOIDED CONTRACT.

CRAIGHEAD *v.* WELLS.

21 MO. 404.—1855.

THIS was an action to recover damages for the alleged breach of an agreement under seal, by which the plaintiff contracted to furnish to the defendants "one wagon and team (in conjunction with Alfred Bowman, part of said wagon and team) and provisions for an overland trip to California," in consideration of which the defendants

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<sup>1</sup> An infant granted an easement for the passage of a sewer through his land. Upon arriving at majority, he disaffirmed the grant. It was held that the continued use of the sewer, after disaffirmance, would be a nuisance which he could abate. *McCarthy v. Nicrosi*, 72 Ala. 332.

bound themselves, "jointly and severally, to pay to said Craighead the one-half of all the net profit that they may make from the first six months' work after they have gotten to work in the mines of California, or in other employment which they can make most profitable, counting the time so employed."

The defendant Nickel relied upon infancy as a defence.

SCOTT, J. \* \* \* There was no error in refusing the fourth instruction asked by the appellant, as to the power of disaffirming the contract in Nickel, by reason of his infancy; nor in giving the instruction in relation to infancy prayed by the respondent, Nickel. The rule that, if an infant avoids an executed contract, when he comes of age, on the ground of infancy, he must restore the consideration which he had received, has no application to the circumstances of this case. This is no executed contract. It is an agreement on the part of an infant to perform services in consideration of provisions previously furnished, and if infancy is not a good plea against a contract of that nature, it is not easy to see of what avail such a defence is in law. \* \* \*

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### MORSE v. ELY.

154 MASS. 458.—1891.

CONTRACT brought by an infant for wages alleged to be due him from the defendant.

BARKER, J. The plaintiff, when of the age of twenty years and in the employment of the defendant, agreed with him that there should be applied toward the payment of his wages a sum of \$10, the difference between the price of a horse and that of a cow which he received in exchange from the defendant, and also further sums for the services of a stallion and of a bull, and for a calf which he bought of the defendant, and for the pasturage of a horse. These items were credited by the minor in his account with his employer. The contracts from which they resulted were fairly made, the prices were reasonable, and all the contracts were, in fact, beneficial to the minor. The cow, and a colt resulting from the service of the stallion, have been sold by him at their full value, for cash. Whether he is yet in the possession of the calf does not appear. He has elected to avoid his contracts with the defendant, and has brought this action to recover for his wages, without deduction for any of the items. The question raised by the bill of exceptions is whether, under the circumstances, the defendant is entitled to be credited with their amount.

None of the contracts were for necessities. The plaintiff had therefore a right to avoid them at his election, and it was not necessary for him, in order so to do, to return the consideration received, or to put the other party in *statu quo*. *Chandler v. Simmons*, 97 Mass. 508, 514; *Bartlett v. Drake*, 100 Mass. 174, 177; *Walsh v. Young*, 110 Mass. 396, 399; *Dubé v. Beaudry*, 150 Mass. 448; *Boody v. McKenney*, 23 Me. 517; *Price v. Furman*, 27 Vt. 268.

If the sums which the defendant seeks to apply in payment had been actually paid to him in money, the plaintiff, upon rescinding his contracts, could recover them back. *McCarthy v. Henderson*, 138 Mass. 310; *Pyne v. Wood*, 145 Mass. 558. The defendant cannot avail himself of and enforce, by way of an allegation of payment, contracts which he could not enforce by a direct suit. *McCarthy v. Henderson*, 138 Mass. 310. To allow him to do so would be to affirm and enforce against the minor contracts which for his protection the law allows him to rescind.

Exceptions overruled.<sup>1</sup>

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8. EFFECT OF AVOIDANCE WHEN ACTION IS BROUGHT, BY THE INFANT, BASED UPON HIS AVOIDANCE.

WHITMARSH *v.* HALL.

3 DENIO (N. Y.) 375.—1846.

ERROR to the Onondaga Common Pleas. Hall, an infant, by his next friend, sued L. & J. Whitmarsh for work and labor. It was proved that the plaintiff had worked for the defendants half a month, under a contract to labor for them for a certain longer period of time, and had left without cause. After the plaintiff had proved the value of the labor, the defendants proposed to ask a witness what the plaintiff's services were worth, taking into consideration the damages they had sustained in consequence of his not fulfilling his agreement. The justice refused to receive this evidence, on the ground that the plaintiff was not, on account of his infancy, bound by his contract; and gave judgment for the plaintiff, which the Common Pleas affirmed on *certiorari*.

JEWETT, J. The evidence offered by the defendants, to show the value of the plaintiff's services, taking into consideration such damages as they had sustained in consequence of his putting an end to

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<sup>1</sup> See however, *Dickerson v. Gordon*, 24 N. Y. State Reporter, 448 (Supreme Ct. General Term, 1889).

the contract by voluntarily refusing to fulfil it on his part, was properly rejected by the justice. This contract was voidable by the plaintiff by reason of his infancy, according to the general rule of law, that the contracts of infants, with certain exceptions which do not embrace this case, may be avoided by them either before or after they arrive at full age. 2 Kent's Com. 237 (5th ed.) There is no case where it has been held that an executory contract, by an infant, not being for necessities, is obligatory upon him. The plaintiff here has put an end to, and avoided his contract with the defendants, by voluntarily leaving their service and bringing this suit to recover the value of his services.

It is insisted on the part of the defendants that the justice erred in rejecting the evidence offered by them on the ground that, although the plaintiff was an infant and had a right to avoid his contract and recover the value of his services, yet that the defendants were entitled, if they had sustained an injury by such avoidance, to have a proper allowance therefor made against such value. In other words, it is claimed that the defendants are entitled, as a set-off against the value of the plaintiff's services, such sum as is equal to the amount of the injury sustained by them, by the avoidance of the contract by the plaintiff, which, in effect, would charge the infant with the performance of his contract, or with damages for its violation. The proposition is not sustained by any elementary principle known to the law, and I do not find that it has been recognized by any adjudged case, unless by that of *Moses v. Stevens*, 2 Pick. 332. In that case, the plaintiff, an infant, had made a special agreement to labor for the defendant a certain time for certain wages, and before the time expired left his service voluntarily without cause. It was held that he might recover on a *quantum meruit* for the services performed, and if this employer was injured by the sudden termination of the contract without notice, a deduction should be made on that account. The learned judge, in delivering the opinion of the court, said: "We think the special contract being avoided, an *indebitatus assumpsit*, upon a quantum meruit lies, as it would if no contract had been made; and no injustice will be done, because the jury will give no more than, under all the circumstances, the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." With great respect, I am unable to yield my assent to the soundness of the qualification annexed to the proposition. I think that the infant plaintiff, in such an action, is entitled, by well-settled principles of law, to recover such sum for his services as he would be en-



titled to if there had been no express contract made. A recovery is allowed upon the assumption that there is no express contract at all.

The judgment under review is therefore correct.

Judgment affirmed.

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VEHUE *v.* PINKHAM.

60 ME. 142.—1871.

ASSUMPSIT to recover for labor from Oct. 10, 1867, to July 25, 1868, \$124.91.

Plaintiff, being still a minor, repudiated his contract, and claimed to recover on a *quantum meruit* the balance stated as the reasonable compensation for his services.

It appeared that while the plaintiff was in the employment of the defendant, and during the latter's absence, the plaintiff, for his own gratification, harnessed the defendant's partially broken colt to the defendant's wagon; that the bit broke, the colt became unmanageable, and, running, threw the wagon against the barn and broke the wagon and harness.

BARROWS, J. The jury were explicitly instructed that the minor was not bound by his contract, and was entitled to recover the value of his services, deducting what he had received from the defendant; and "that if the colt was harnessed with the consent of the defendant, the plaintiff would not be liable to have the damage deducted from his wages; but if the plaintiff harnessed the colt contrary to the defendant's orders, the jury might deduct the amount of the injury so done from the value of his services to the defendant."

The phraseology of this last instruction was faulty; but we do not perceive that the plaintiff could have been wronged thereby. It was what his services were reasonably worth under all the circumstances of the case that he was entitled to recover. If by his negligence or disobedience of orders he broke his employer's tools or damaged his property, his services were manifestly worth just so much less. The proper instruction would have been that the jury might consider such circumstances in estimating the value of his services.

Practically, however, the effect of the instruction given was precisely the same. The plaintiff was not injured by the failure of the presiding judge to use language that was technically correct.

Exceptions overruled.

APPLETON, C. J.; CUTTING, WALTON, DANFORTH and TAPLEY, JJ., concurred.

WILHELM *v.* HARDMAN.

13 MD. 140.—1858.

TUCK, J. This is an action by an infant, to recover for work and labor. There are several pleas, one of which, in substance, states that in August, 1852, the plaintiff agreed with defendant to work and labor for him, on his farm, for seven years, in consideration that the defendant then and there agreed and contracted, on his part, to provide for the plaintiff necessary meat and drink, lodging and clothing, and to give him some schooling when there was a school convenient, during the time he would work and labor for defendant; and that if the plaintiff remained and worked for the defendant for the seven years, that the defendant would give him a horse, saddle and bridle in addition; that the defendant entered into said contract with the plaintiff, and that he performed everything on his part to be performed, but the plaintiff refused to perform the contract on his part, and left the service of the defendant before the seven years expired, and that the causes of action contained in the declaration are the same, and no other, than those which the plaintiff did under said contract. To this plea, the plaintiff, among other replications, set up his infancy at the time of the alleged contract, to which the defendant demurred; and the court ruled against the demurrer. This issue in law, therefore, presents the question, whether the matter of the plea is in answer to the action; in other words, whether an infant can agree to work and labor, as a consideration for his support, and, after the contract had been partially, and concurrently performed on both sides, disaffirm his engagement and sue for the value of the services rendered.

Upon looking at the record, we cannot say that the contract pleaded is anything but an agreement for necessaries. Bac. Abr. Infancy; Com. Digest, *Enfant*; Chitty on Contracts, 136, 137, 138; Parsons on Cont. 245; 13 Pick. 1. We lay out of view the engagement of the defendant to give the plaintiff a horse and equipments, because, being something in addition to his support, the plaintiff cannot aver this item of the agreement to avoid it *in toto*. And we must bear in mind that the suit is not by the party who furnished the necessaries, but by the infant for his wages, which places the latter in a different relation in point of law, as to his contract, than it would have been if he had been sued. *Corpe v. Overton*, 10 Bing. 252.

The plaintiff's counsel, admitting that an infant is liable for necessaries, contends that his contracts for labor and service are not

binding on him, that if he chooses to avoid them he may recover, on a *quantum meruit*, for the work actually done, and that in an action like the present, the value of the services cannot be diminished by allowing the employer for any injury which he may have suffered from the refusal of the infant to perform the contract. For the purposes of this case, we may concede that, as a general rule, the contract of an infant for labor and service, for wages, is not binding on him, and that he may avoid his agreement and sue for the value of his services. Some of the cases cited clearly show this. But they were not like the one before us. Even in Massachusetts, whose State Reports contain several such, it has been decided that where an agreement had been made by a minor with another, that the former should serve the latter, for his board, clothing and education, and the contract had been performed, the minor could not, after arrival at age, sue for wages, although he offered evidence that his services were worth more than his maintenance and education. The court said it was a contract for necessities, in which the employer took the risk of the health and capacity of the minor, and that it would be injurious rather than beneficial to minors to hold such agreements as of no effect. *Stone v. Dennison*, 13 Pick. 1. See, also, 12 Pick. 110. The contract in 13 Pick. was assented to by the guardian of the minor, which circumstance was noticed as evidence that it was fair and reasonable at the time it was entered into. But as the contract here is not assailed on any such ground, but objected to only because of the infancy of the party, and not appearing to be unreasonable, it stands unaffected by the want of such assent. As set out in the plea, it is such a contract as might have been made with the defendant by articles of apprenticeship under the acts of assembly; for the law does not require that an infant shall be put to learn a trade, or have any degree of education, but that these shall be provided for by the justices, "in all cases where they can." Act of 1793, ch. 45. In *Harvey v. Owen*, 4 Blackf. 337, it was held, that a minor could not, on the ground of infancy, rescind a contract of this description, fairly made and apparently to his advantage, and sue for the value of the labor performed. The court agreed that the minor might abandon the service, and, while conceding that the decisions on the question of his right to maintain the action had not been uniform, thought the sounder principle and the preponderance of authority to be, that he could not recover, and that to suffer him to do so would be enabling him to practice upon others that fraud and imposition against which his privilege of infancy was designed to protect himself. See, also, Macpherson on Infants, ch. 36. Thus it will be seen that

there are decisions against the doctrine of the cases cited on the part of the plaintiff, as sought to be applied on this appeal; and whatever force of authority they may have in the states where pronounced, they have no binding effect here.

\* \* \* \* \*

It was urged in argument that the services might be worth more than the support furnished, and that the employer would thereby obtain an advantage over the infant. This may occur in some cases; but we must remember that the infant may leave the employment at his own caprice, or whenever he can procure better returns for his labor. The employer is subject to his will. If this reason did not apply, we think it more in accordance with the policy of the law in reference to infants, that they should be held bound by their contracts of this kind, as far as performed, than to offer inducements to them to obtain employment with persons acting in good faith, and, afterwards, sue for compensation, not contemplated by the other party at the time of the agreement. There are, doubtless, many persons willing to afford homes and support to indigent minors, who would not take them as apprentices, or agree to give more than their maintenance and education as a return for their labor, and many minors would be fortunate in obtaining such places. But, if it be established that not only is the performance of such contracts to depend, as it must under the law, on the fidelity of the minor, but that the other party may also be compelled to pay what he never expected, we presume few such places could be had. There would then be many instances of persons under age refusing to be apprenticed, yet without employment as a means of support, because of the advantage which such a construction of the law would give the evil disposed over all who might take them into their service, even on the terms, though without the forms, of a legal apprenticeship. The consequences in most cases, would be visited upon society. If, therefore, the principle adverted to had not been plainly recognized by the Court of Appeals, we should feel warranted in adopting, and applying it to the present case, as well on grounds of public policy as to promote the interests of the very class in whose behalf our sympathies were invoked — a class whose surest protection is often found in the very restraints which the law imposes.

It was also insisted that the agreement not being in writing, it could have no effect in the cause; but we think that, according to the exposition of the statute of frauds, as given in *Ellicott v. Peterson's Exc'rs*, 4 Md. Rep. 476, the defence was well taken, such a contract not being within the statute. 1 Smith, Lead. Cases (ed. of



1855), 432; *Peter v. Compton*. The defendant's exceptions to the rulings of the court on the prayers present, substantially, the validity and effect of the agreement, but as the judgment must be reversed on the demurrer, they need not be examined.

Judgment reversed without *procedendo*.

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### LEMMON *v.* BEEMAN.

45 OHIO ST. 505.—1888.

THE plaintiff below sued the defendant for money paid by him upon the purchase of a certain stock of drugs of the decedent, the plaintiff being a minor at the time of the purchase, and having elected on becoming of age to rescind the contract. The judgment was for the plaintiff and was affirmed in the district court. The part of the charge, to which exception was taken, is to the effect that upon the facts of the case, the plaintiff could recover without returning the property.

MINSHALL, J. \* \* \* The only question presented upon the record is, whether, upon the facts as stated, the minor had the right, on becoming of age, to rescind the contract and recover the consideration he had paid, without returning the property that had been sold and delivered to him.

The true doctrine now seems to be that the contract of an infant is in no case absolutely void. 1 Par. Cont. 295, 328; Pol. Cont. 36; *Harner v. Dipple*, 31 Ohio St. 72; *Williams v. Moor*, 11 M. & W. 256. An infant may, as a general rule, disaffirm any contract into which he has entered, but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance, on his arriving at age; in other words, infancy confers a privilege rather than imposes a disability. Hence, the disaffirmance of a contract by an infant is the exercise of a right similar to that of rescission in the case of an adult — the ground being minority, independent of questions of fraud or mistake. But, in all else, the general doctrine of rescission is departed from no farther than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield and not a sword. He is not in all cases, as is an adult, required to restore the opposite party to his former condition; for if he has lost or squandered the property received by him in the transaction that he rescinds, and so unable to restore it, he may still disaffirm the contract, and recover back the consideration paid by him without

making restitution; for, if it were otherwise, his privilege would be of little avail as a shield against the inexperience and improvidence of youth. But when the property received by him from the adult is in his possession, or under his control, to permit him to rescind without returning it, or offering to do so, would be to permit him to use his privilege as a sword rather than a shield.

This view is supported not only by reason, but by the greater weight of authority. It was recognized and applied by this court in *Cresinger v. Welch*, 15 Ohio, 156, decided in 1846. The following is the language used by Mr. Tyler on the subject: "If the contract has been executed by the adult, and the infant has the property or consideration received, at the time he attains full age, and he then repudiates the transaction, he must return such property or consideration, or its equivalent, to the adult party. If, however, the infant has wasted or squandered the property or consideration received during infancy, and on coming of age repudiates the transaction, the adult party is remediless." He then adds that: "There are expressions of judges and text-writers against this latter proposition, but," he says, "the weight of authority is in harmony with it, and is decidedly in accord with the general principles of law for the protection of infants." Tyler, *Inf.* (2d ed.), 80, and cases cited by the author. See, also, the case of *Price v. Furnam*, 27 Vt. 268, and the notes thereto of Mr. Ewell in his *Leading Cases on Infancy and Coverture*, 119. After an exhaustive review of the cases, this author says: "The true doctrine, and the one supported by the weight of authority (at least in the United States), would seem to be that, where an infant disaffirms his executed contract after arriving at age, and seeks a recovery of the consideration moving from him, and where the specific consideration received by him remains in his hands in specie at the time of the disaffirmance, and is capable of return, it must be returned by him; but if he has during infancy wasted, sold or otherwise disposed of, or ceased to possess the consideration, and has none of it in his hands in kind on arriving at majority, he is not liable therefor, and may disaffirm without tendering or accounting for such consideration."

This statement of the law, supported as it is, not only by the greater weight of authority, but also of reason, meets with our full approval. There is, however, much conflict in the decisions of the different states, greater, perhaps, than upon any other question connected with the law of infancy (*Met. Cont.* 76); but we deem it unnecessary to attempt to review or discuss them, for the very good reason that it has been done with thoroughness and ability by the authors just referred to.

See, also, the notes of Mr. Ewell to the recent case of *Adams v. Beall*, decided by the Maryland Court of Appeals, 26 Am. L. Reg. 760.

We have been cited by counsel for the defendant below to a number of the previous decisions of this court, supposed to affect the rights of the plaintiff to recover; but a careful examination will disclose that such is not the case. In *Starr v. Wright*, 20 Ohio St. 97, a conveyance had been made by a father to his minor son, it being without any consideration, and intended to defraud creditors; and, during minority, the son had reconveyed to the father, to enable him to raise money and pay his creditors, who for a full consideration then conveyed to the defendant. The court denied the right of the son, on arriving at age, to disaffirm the deed of reconveyance. Being the voluntary grantee of his father, the son had done no more than was his moral duty to do, and what he might have been compelled to do in favor of creditors and purchasers. The court applied the maxim that infancy is a shield and not a sword. The case is quite analogous in principle to the leading one of *Zouch v. Parsons*, 3 Burr. 1794, decided by Lord Mansfield in 1765. It was there held that where an infant does what he might have been compelled by a court of equity to do, he cannot afterwards disaffirm his act. In *Harner v. Dipple*, 31 Ohio St. 72, the question was whether an undertaking executed by an infant for stay of execution was void or only voidable. The court held that it was voidable only, and might therefore be, as it had been, affirmed by the infant on arriving at age. In *Curtiss v. McDougall*, 26 Ohio St. 67, it appears an infant had purchased a team of mules, and at the same time had executed a mortgage on them to secure the purchase-money. He afterwards sold the property to his father, who brought an action in replevin against an assignee of the mortgage to recover possession. The claim was based on the theory that, by the subsequent sale of the mortgaged property, the infant had disaffirmed the mortgage, as he would have a right to do. It is difficult to see how the sale of the property purchased could be treated as a disaffirmance of the contract by which he had acquired it; it was rather an affirmation than a disaffirmance of that contract, and entirely consistent with the existence of the mortgage that he had given to secure the payment of the purchase-money. Again, there was no positive disaffirmance by the infant, the claim being made by a third person, his grantee, although the rule is well settled that the privilege is personal to the infant, and is not available to third persons. 1 Par. Cont. 329. But the court placed its decision upon the broader ground, that it was not within the privilege of the infant to disaffirm the security he had given for the

purchase-money, without also avoiding the purchase, saying that, "In such case if the infant would rescind a part, he must rescind the whole contract, and thereby restore to the vendor the *title* acquired by the purchase;" again applying the principle that infancy may be used as a shield but not as a sword. So that the claim of the plaintiff in replevin defeated his right to recover, as a disaffirmance of the mortgage would necessarily have divested the title by which he claimed the property.

It is apparent that none of these cases, when rightly considered, affect the right of the plaintiff to disaffirm the purchase made of the decedent, and to recover the consideration paid. Neither he, nor any one claiming under him, makes any claim to the property purchased. By his disaffirmance the title has been restored to the estate of the vendor, and the property, or its value, may be recovered by the administrator, if it was wrongfully taken by the sheriff under the execution against Everett.

Judgment affirmed.

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## JOHNSON *v.* NORTHWESTERN MUT. LIFE INS. CO.

56 MINN. 365.—1894.

APPEAL by the defendant, the Northwestern Mutual Life Insurance Company, from an order of the District Court of Hennepin County, Seagrave Smith, J., made August 16, 1893, overruling its demurrer to the complaint.

On October 25, 1888, the defendant insured the life of the plaintiff, Martin C. Johnson then of Stoughton, Wis., in the sum of \$1,000. By its policy it agreed to pay him that sum twenty years thereafter, or in case of his death meantime to pay it to his representatives or assigns sixty days after due proof of his decease. After ten years he was to share in the surplus profits of the company arising from the policy. After three or more annual premiums were paid he was entitled to a paid-up, non-participating policy for as many twentieth parts of the \$1,000 as he had paid annual premiums. He paid \$23.29 on that date and agreed to pay a like sum every six months thereafter. He was then but seventeen years of age. He paid seven of these semi-annual installments, in all \$186.32. On December 19, 1892, immediately after he became of age, he served written notice on the insurance company that he elected to avoid the policy and offered to return it and demanded a return of the money he had paid. It was not repaid, and he soon after brought this action to recover it. His complaint stated these facts and a copy of the



policy was attached. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendant appeals.

MITCHELL, J. This case was argued and decided at the last term of this court. A reargument was granted for the reasons that though the amount was small the legal principles involved were important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere. (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on the part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he had died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money, because plaintiff himself was not one of those insured who died. The case is, therefore, one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant.

The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should

hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule, the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business with a capital of \$5,000, should from time to time, buy and pay for \$100,000 worth of goods, in the aggregate, which he had sold, and had got his pay. According to this doctrine, he could recover back the \$100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others, but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to bar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessities. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessities, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities:

First. That, in so far as the contract is executory on part of an infant, he may always interpose his infancy as a defence to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the

difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief where the other party has been found guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot. This was held in the leading case of *Holmes v. Blogg*, 8 Taunt. 508, approved as late as 1890 in *Valentini v. Canali*, 24 Q. B. Div. 166. Some *obiter* remarks of the chief justice in *Holmes v. Blogg*, to the effect that an infant could never recover back money voluntarily paid, were too broad, and have often been disapproved — a fact which has sometimes led to the erroneous impression that the case itself has been overruled. *Corpe v. Overton*, 10 Bing. 252 (decided by the same court), held that the infant might recover back what he had voluntarily paid, but on the ground that the contract in that case remained wholly executory on part of the other party, and hence the infant has never enjoyed its benefits.

In Chitty on Contracts (volume 1, p. 222), the law is stated in accordance with the decision in *Holmes v. Blogg*. Leake, — a most accurate writer — in his work on Contracts (page 553), sums up the law to the same effect. In this country, Chancellor Kent (2 Kent, Com. 240), and Reeves in his work on Domestic Relations (chapters 2 and 3, tit. "Parent and Child") state the law in exact accordance with what we term the "English rule." Parsons, in his work on Contracts (volume 1, p. 322), undoubtedly states the law too broadly in omitting the qualification, "and enjoys the benefit of it."

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53 (8 Atl. 664); *Breed v. Fudd*, 1 Gray, 455. But many — perhaps a majority — of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have

modified it; and some of them seem to have wholly repudiated it, and to hold that, although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if he had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

The dissatisfaction with what we have termed the "English rule" seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult, the court would grant him no relief, but leave him to stand the consequence of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between the adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. When a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties.

If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view



of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence or overreaching.

A similar principle applies to all the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment,—as, for example, parent and child, husband and wife, guardian and ward. It is true that the mere fact, that a person is dealing with an infant creates no “fiduciary relation” between them in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this, as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant shall recover would depend on the nature and extent of the element of unfairness which characterized the transaction.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering of the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill, 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251,—really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant,

beneficial to himself, has been wholly or partly executed on both sides but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on the part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair and reasonable contract, and one which is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract, the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, non-participating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, non-participating policy for \$200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds.

Order affirmed.<sup>1</sup>

GILFILLAN, C. J. dissented.

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<sup>1</sup> *Contra*, on a like state of facts, *Simpson v. Co.*, 184 Mass. 348.

GREEN *v.* GREEN.

69 N. Y. 553. — 1877.

THIS was an action of trespass upon lands. The defendant, among other things, pleaded title. The facts found were substantially as follows: On the 8th day of March, 1866, the defendant, being then the owner of the premises in question, and plaintiff being an infant of the age of about eighteen years, in consideration of the sum of \$400 to him paid by the plaintiff, sold and conveyed to the plaintiff, who was his father and knew his infancy and actual age, the said premises, and thereupon entered into possession thereof and has since occupied the same. Prior to the defendant's obtaining his majority, he had wasted or otherwise ceased to possess the purchase price of said premises, and at that time was possessed of no property whatever excepting said land. On or about May 1, 1873, the defendant re-entered upon said premises with the purpose and with notice of his intent to disaffirm the deed, and the alleged trespasses were those done in and about such re-entry.

CHURCH, Ch. J. The important question in this case is whether it was necessary for the defendant to restore the consideration received for the transfer of the land to the plaintiff to entitle him to rescind the contract. The defendant is a son of the plaintiff. He conveyed to the plaintiff the premises in question when under the age of twenty-one years, for which he received the sum of \$400. It appeared affirmatively that the son had used up, lost, or squandered the money before he became of age, and had no part of it, nor any other property except the land at the time of arriving at age. After a careful examination of the authorities and the conflicting opinions below, we are inclined to concur with the opinion of Gilbert, J., in the affirmance of the judgment. We do not deem it profitable to review the authorities upon the question, and do not intend to extend our decision beyond the principal facts involved in this case.

There are expressions of judges, and general rules laid down by text-writers, and some cases which seem to favor the doctrine contended for by the appellant, but in nearly all of them there is a manifest distinction in the facts. The weight of authority is to the contrary effect. 10 Peters U. S. 58, 74; 97 Mass. 508; 6 Gray, 279; 27 Vt. 268; 100 Mass. 174. These and like authorities, we think, accord with the general principles of law for the protection of infants. The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are

improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether. A person purchasing real estate of an infant, knowing the fact, and especially the father, must and ought to take the risk of the avoidance of the contract by the infant after arriving at maturity. The right to rescind is a legal right established for the protection of the infant, and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing, would tend to impair the right and withdraw the protection. Both upon authority and principle we think a restoration of the consideration could not be exacted as a condition to a rescission on the part of the defendant.

Mere acquiescence for three years after arriving at age without any affirmative act was not a ratification. 11 J. R. 539; 14 Id. 124; 23 Maine R. 517. The entry made by the defendant in this case for the purpose of disaffirming the contract with notice of such intention was sufficient to entitle him to recover. 17 Wend. 120.

The judgment must be affirmed.

All concur; ANDREWS, J., absent.

Judgment affirmed.

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### RICE *v.* BUTLER.

160 N. Y. 578. — 1899.

HAIGHT, J. The appeal in this case is based upon the certificate of the Appellate Division to the effect that questions of law are involved which ought to be reviewed by this court. The action was brought in the Municipal Court of Syracuse to recover the sum of \$26.25, paid by the plaintiff, a minor seventeen years of age, upon a contract for the purchase of a bicycle. The contract price was \$45; \$15 were paid upon the execution of the contract, and the remainder was to be paid in weekly installments of \$1.25. The plaintiff purchased the wheel in June and used it until about the 20th of September and then returned it to the defendant, asserting that she had been defrauded, and demanded repayment of the amount that she had paid upon the contract. The defendant took the wheel, but refused to return the money, claiming that the use of the wheel and its deterioration in value exceeded the sum paid. Upon the trial evidence was submitted on behalf of the defendant tending to show



that the use of the wheel and its deterioration in value equaled or exceeded the amount that had been paid upon the contract. The trial court found in favor of the defendant, thus establishing the fact that there had been no fraud on the part of the defendant in making the contract.

It is now contended that the contract was executory, and that being such the plaintiff had the right to rescind and recover back the amount paid. The Appellate Division appears to have taken this view of the case, and has reversed the judgment. The question thus presented may not be free from difficulty. There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but in so far as the payments made were concerned the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his Commentaries (Vol. 2, page 240), says: "If an infant pays money on his contract and enjoys the benefit of it and then avoids it when he comes of age he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other."

In the case of *Gray v. Lessington*, 2 Bosw. 257, a young lady during her minority had purchased a quantity of household furniture, paying about half of the purchase price, and had given her note for the balance. She subsequently rescinded the contract and sought to recover the amount that she had paid. She had had the use of the furniture in the meantime, and it was held that she must account for its deterioration in value. Woodruff, J., in delivering the opinion of the court, says: "When it becomes necessary for an infant to go into a court of equity, to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration."

In the case of *Medbury v. Watrous*, 7 Hill, 110, an action was brought by an infant to recover for services performed, of the value of \$70. The defense was that the work was done in part performance of a covenant to purchase of the defendant a house and lot for the sum of \$600. He had not entered into the possession of the house and lot and had received no benefits from the purchase. It was held that he could rescind the contract, and, having received nothing under it, he could recover upon a *quantum meruit* for the work performed. Beardsley, J., in delivering the opinion of the court, refers to the rule laid down by Chancellor Kent, and then to the case of *Holmes v. Blogg*, 8 Taunt. 508, and says, with reference to the later case: "It was not shown what had been the value of the use of the premises demised, while the infant remained in possession. If that was less than the sum paid by him, it may well be that he ought to have recovered the difference." It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is, that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justness and in fairness, to account for its reasonable use or deterioration in value. Otherwise she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property the value of the use would be deemed to include the deterioration in value, and, under the evidence in this case and as found by the trial court, the use equaled the sum paid. Our attention has been called to the cases of *Pyne v. Wood*, 145 Mass. 558, and *McCarthy v. Henderson*, 138 Mass. 310, but we think the rule suggested by us is more equitable and that they should not be followed.

The judgment of the Appellate Division should be reversed and that of the trial and County Court affirmed, with costs, and the second, third and fourth questions certified to us answered in the affirmative. An answer of the first question is not deemed necessary further than intimated in the opinion.

All concur.

Judgment reversed, etc.<sup>1</sup>

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<sup>1</sup> *Contra* on a like state of facts, *Gillis v. Goodwin*, 180 Mass. 140. For a review of the New York cases, see the prevailing and dissenting opinions in *Rice v. Butler*, as reported in the court below, 25 App. Div. 388.

DRUDE *v.* CURTIS.

183 MASS. 317. — 1903.

**CONTRACT** for \$130 paid by the plaintiff when an infant on a contract for the purchase of a horse, harness and buggy, repudiated by him on coming of age, with a second count for money had and received, and a third count, added by amendment, in tort for the conversion of \$130 paid by the plaintiff to the defendant. Writ dated July 31, 1900. The case was tried before BISHOP, J., without a jury. It appeared that the plaintiff and defendant, both being minors, entered into an agreement whereby the defendant delivered to the plaintiff a horse, harness and buggy, and the plaintiff agreed to pay therefor \$225 in installments at stated times, the title to the property not to pass until the whole \$225 was paid. The plaintiff paid installments amounting to \$130. He then came of age, and three days later brought this action and attached the horse, harness and buggy as the property of the defendant. On the return day of the writ the defendant came of age. The defendant had spent the \$130 before the date of the writ. The judge ruled that the plaintiff could not recover in contract, but might recover in tort under his declaration as amended, for the conversion of \$130 paid to the defendant. He found for the plaintiff in the sum of \$145.60, and the defendant alleged exceptions.

HAMMOND, J. Both parties being infants at the time of the contract, either could avoid it without a return of the consideration. But neither could avoid it in part. He must avoid it wholly, if at all. And if the infant, when avoiding the contract, has in his hands any of the specific fruits, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. *Chandler v. Simmons*, 97 MASS. 508, 514, 97 Am. Rep. 117. The plaintiff, who was the buyer, sought first to exercise his right to avoid, and brought this action to recover the money; and, if the defendant also had not been an infant, he would have had no defense, upon the count in contract, because the law would have implied a contract upon his part to refund the money. But the difficulty with the plaintiff's case is that the defendant is meeting the plaintiff with a weapon like that used by him, to wit, avoidance of a contract on the ground of infancy. And while the infancy of the plaintiff is a shield to him, it does not prevent the defendant from relying upon his own infancy in turn as a shield to him. So far as respects the right of the defendant to take advantage of his own infancy, it is immaterial whether the plaintiff be an infant

or an adult. Can the plaintiff recover in this action the money paid by him to the defendant? The defendant spent it before the plaintiff avoided the contract. His plea of infancy is a complete defense to the counts in contract. So the court ruled, and we do not understand that the correctness of this ruling is contested by the plaintiff. If at the time the plaintiff elected to avoid the contract the defendant had in his possession the same money which he received from the plaintiff, then since, by reason of the avoidance, the defendant had no right further to hold it, the plaintiff perhaps might have maintained replevin, or, upon proper proceedings taken, have maintained trover as for a subsequent conversion.

The plaintiff contends that trover will lie even if, at the time he avoided the contract, the money had been spent. But one great difficulty upon the facts in this case is to find any conversion, any tortious dealing with the money. There was no tortious act on the part of the defendant in obtaining it. It was paid to him to be held and used by him as his own money, in accordance with the terms of a contract which is not claimed to have had in it any element of fraud. There was nothing tortious in that. Having received it as his own money, he spent it as such, and all this the plaintiff, not yet having avoided the contract, must be held to have expected and consented to. There was, therefore, nothing tortious in any act of the defendant, with reference to the money, before the contract was avoided. Nor has the defendant been guilty of any tortious act since, unless it be his failure to refund an equal sum to the plaintiff; but that failure at the most can be considered only as a breach of an implied contract, and this the law permits him to avoid. To hold that, while for this failure to pay over under these circumstances he cannot be held in contract, but still can be held in tort, is to convert that which arises out of a contract into a tort, and to take away the shield which the law throws around the infant for his protection. Upon this theory money lent to an infant might be recovered. The plaintiff finds himself where any one is likely to be who places money into the hands of an infant with the right to spend it as his own money, and the right has been exercised. Upon this general subject see *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510, and cases cited; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345.

The plaintiff relies upon *Walker v. Davis*, 1 Gray, 506, as decisive in favor of the right to maintain this action, but an examination of the case will show that the ground upon which the decision was based in no way conflicts with the conclusion to which we have come. In that case, which was trover for the conversion of a cow, it



appeared that the defendant, an infant, plied the plaintiff, who was an old man, with liquor until he became drunk, and then took advantage of the plaintiff's incompetent condition to trade for a cow. The defendant took the cow, and gave his note in payment. When the note became due, the plaintiff brought a suit upon it, in which the defendant prevailed upon the plea of infancy. The plaintiff then brought the suit in trover. The defense was that the plaintiff had waived the tort, and affirmed the contract, and also that, when the note fell due, the defendant had sold the cow, and parted with all control over her. The court held the action maintainable, disposing of the first ground of the defense by saying that, since the defendant also had avoided the contract, the plaintiff's attempted affirmation did not become operative, and, as to the second ground, that there had been a conversion, and consequently trover would lie. But the conversion relied upon was not the sale of the cow, but the taking at the time of the contract. The contract was voidable by the plaintiff upon the ground of fraud. Upon coming to his senses, the plaintiff might have rescinded the contract, and, without any demand, have brought trover for the cow upon the ground that she had been tortiously taken from him under a fraudulent contract (*Thurston v. Blanchard*, 22 Pick. 18, 33 Am. Dec. 700); and since, at the time of this suit, his right to rescind still existed, the remedy still existed. And the plea of infancy was no defence, because, in the language of Thomas, J.: "The defendant obtained the possession of [the cow] by fraud, a fraud to which infancy would constitute no defence." It is thus seen that the action was sustained upon the ground that the original taking, being fraudulent, was tortious. No question seems to have been made as to whether infancy would have been a defence to such a fraud. The court assumed that it would not be a defence, and, having so assumed, held that the taking of the cow at the time of the contract was tortious. *Walker v. Davis* is therefore no authority for the contention that the subsequent spending of the money by the defendant in this case was tortious.

Exceptions sustained.

## HAMILTON v. VAUGHAN-SHERRIN ELECTRICAL ENGINEERING COMPANY.

[1894] 3 CH. 589. (Eng.)

THE plaintiff, while an infant, applied for shares in a company and paid the amount due on application. The shares were duly allotted to her, and she paid the amount due on allotment. No dividends were received by her, nor did she attend any meetings of the company. Six weeks after allotment, while still under age, she repudiated the contract, and asked for repayment of the money paid by her to the company. She subsequently brought an action to recover the money. The company then went into liquidation, and the liquidator removed her name from the register of shareholders.

STIRLING, J. The case now comes on in order that I may decide whether or not the plaintiff is entitled to a return of £60 paid by her to the company. This is claimed on the ground that there has been a total failure of consideration.

Three cases have been cited before me on this point. The first is *Holmes v. Blogg*, 8 Taunt. 508, 511. There the plaintiff brought an action to recover a sum paid by him during infancy to the defendant, who was lessor to the plaintiff and to one Taylor, with whom the plaintiff was in partnership. The lease was granted to the plaintiff and Taylor, and £157 10s. was paid by the plaintiff as a premium. Under the lease, Taylor and the plaintiff occupied the premises for three months. The infant afterwards avoided the lease, and then brought an action to recover the premium. Gibbs, C. J., in delivering the judgment of the court, refers to an expression of opinion by Lord Mansfield in the House of Lords, where he says: "If an infant pay money with his own hand without a valuable consideration for it, he cannot get it back again," and it was held that the infant was not entitled to recover. In *Ex parte Taylor*, 8 D. M. & G. 254, which was a case of a very similar nature, an infant had entered into an agreement for a partnership and paid a premium on entering. He devoted much time to the business, and received an allowance weekly, amounting altogether to £172, but before he came of age he disaffirmed the contract. It was held that he could not prove for the premium in the bankruptcy of his late partner, on the ground that the contract had been part performed on each side, and the consideration had not wholly failed. The former of these two cases was considered in *Corpe v. Overton*, 10 Bing. 252. In that case the plaintiff, while an infant, signed a written agreement to enter into a partnership which was not to commence at once, but at a future date, and he

paid down £100 as deposit. Between the date of the agreement and the date when the partnership was to commence, the plaintiff came of age, revoked the agreement, and rescinded the contract, and brought an action to recover the deposit. In opposition to his claim *Holmes v. Blogg*, 8 Taunt. 508 was relied upon, but the whole of the judges composing the court distinguished that case. Tindal, C. J., said, 10 Bing. 255: "In *Holmes v. Blogg*, the infant had paid £157 as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the chief justice in delivering his judgment, yet when he comes to apply them to the subject before the court, he gives them a less extensive latitude. After referring to the opinion of Lord Mansfield, he goes on: 'What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.' The ground, therefore, of the judgment in *Holmes v. Blogg*, 8 Taunt. 508, was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before." Then, after discussing the facts in that case, he adds, 10 Bing. 257: "As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to *Holmes v. Blogg* is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into until January, 1833; and in the meanwhile the infant had derived no advantage whatever from the contract." And he held that the infant was entitled to recover. Gaselee, J., said: "I consider the present case as clearly distinguishable from *Holmes v. Blogg*." Bosanquet, J., said: "We are far from impeaching the judgment of the court in *Holmes v. Blogg*, as applicable to the facts of that case. There, the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from

the outlay of which he had derived an advantage. There is no reason, therefore, for finding fault with that decision. It is, however, a general rule, that upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in worse situation than others. Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed." And Alderson, J., said, 10 Bing. 259: "In this, the case is clearly distinguishable from *Holmes v. Blogg*. Here the infant has had no enjoyment of any advantage from the contract; in *Holmes v. Blogg* he had enjoyment, for a period, of premises demised to him; and so far was in the same situation as if he had paid for expensive clothes or other articles not necessary, and after wearing them had brought an action for the price. In such an action he could not be allowed to recover, although the tradesmen, if unpaid, could not have enforced payment."

It is to be observed that all the learned judges who dealt with the case distinguished it from *Holmes v. Blogg*, 8 Taunt. 508, on the ground that in that case there had been actual enjoyment of the demised premises. They did not say that the mere demise itself, in the absence of occupation, would have been enough, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any real advantage under the contract.

In the present case there was no advantage to the infant. Certainly there was no pecuniary advantage to her. She took no part in the management of the company and did not attend any meetings. No doubt there was an allotment of shares, and her name was placed on the register. It seems to me that that is not an advantage within the rule of *Corpe v. Overton*, 10 Bing. 252. The consideration has totally failed and the plaintiff is entitled to recover, *i. e.*, to prove for the amount in the winding-up.

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### MANNING *v.* JOHNSON.

26 ALA. 446.—1855.

TRESPASS *quare clausum fregit* by Pierce Manning against Robert Johnson, to recover two town lots in Livingston, together with damages for their detention.

"The question was, whether plaintiff could recover without having shown a return, or an offer to return, the purchase-money which he had received from the defendant for the premises sued for. The



court charged the jury, that if they believed from the evidence that plaintiff, at the time he sold and conveyed the premises to the defendant, was an infant under the age of twenty-one years, but that the contract between them was executed—that is, that the purchase-money was paid by the defendant, and the possession, with the deed, delivered up by plaintiff—then, to entitle plaintiff to recover in this action, he must have repaid, or offered to repay, the purchase-money to the defendant; and to this charge the plaintiff excepted."

This charge of the court is now assigned for error.

CHILTON, C. J. It is now the settled doctrine, that the deed of an infant is not void, but voidable only. Reeve's Dom. Rel., p. 250 *et seq.*: *Zouch v. Parsons*, 3 Burr. 1794; *Elliott v. Horn*, 10 Ala. 348-54; *Weaver v. Jones*, 24 Id. 420.

Ordinarily, it is the privilege of an infant to rescind his contract at pleasure; and this, without regard to whether such contract was a fair one or not. This general rule is subject to certain exceptions, but these are not involved in the case before us, unless his failure to return the purchase-money, which he has received in consideration of the sale and conveyance of his land, deprives him of the power of rescission.

Upon this subject we have carefully looked into the books, and find much conflict of authority; and without, in this place, commenting upon them, we state as our conclusion, that while we fully subscribe to the doctrine that the infant must use his privilege as a shield to defend himself, and not as an offensive weapon to injure others, we cannot subscribe to the doctrine that he must refund the purchase-money which he has received, and which there is no evidence he has had in his possession after he attained his majority, as a condition precedent to his rescinding or avoiding his conveyance at law. We agree that the strong current of authority is otherwise in a court of equity; but we express no opinion now as to the rule that court should proceed upon in such cases.

The effect of the ruling of the primary court is, to turn this conveyance into a *quasi* mortgage, and to allow the infant the mere right of redeeming his land upon repayment of the sum advanced to him. But, we apprehend, if the parties had expressly contracted for that relation, the infant would not have been held concluded by the mortgage. Mr. Coote, in his *Work on Mortgages* (p. 105), says: "With respect to infants they are, of course, incapable of executing a mortgage of their own property, or of lending money on mortgage; nor has the guardian, or trustee, nor even the court of chancery, any power to change the nature of the infant's estate," etc. 1 Pow. on Mortg. 58-9.

When we come to reason upon the proposition, however, it is surrounded with difficulty; for, if the infant can raise money to the whole value of his estate by a voidable sale or mortgage, and can only avoid the conveyance after refunding, he is furnished the means of indulging habits of dissipation and prodigality, which in many instances would doubtless result in squandering the whole of the proceeds; while the purchaser or mortgagee would risk nothing, the land or estate of the infant so sold or mortgaged furnishing adequate security. On the other hand, to allow the infant to retain the consideration, and yet to repudiate or disaffirm the conveyance, would tempt as well as enable him to practice frauds upon others. We think the safe rule should furnish a check both upon the infant and the party contracting with him. That rule we take to be this: If the infant, after he arrives at age, is shown to be possessed of the consideration paid him, whether it be property, money, or choses in action, and either disposes of it so he cannot restore it, or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmance of the contract. So, likewise, if it be shown that he has the power to restore the thing that he received, he cannot be allowed to rescind, without first making restitution. But if, as in the case before us, the consideration paid was money, and there is no proof that he was possessed of the money so obtained, either actually or constructively, after he attained his majority, so as to be able to restore it to the purchaser, the infant shall not be required, in a court of law, to re-pay the amount he received, as a prerequisite to an avoidance of his deed by suit for the land. When he succeeds in recovering the land, it works the destruction of the contract; and according to the more modern authorities, which we are disposed to consider as correct, the purchaser who has lost the land may sue for and recover the money; and especially would this action lie in a case like this, where the purchaser was induced to enter into the contract upon the false representations made by the infant, that he was of full age, and consequently competent to contract. We would not be understood as intimating, that if the infant sought a rescission in a court of equity, he would not be required to refund the purchase-money, whether he had disposed of it or not before he arrived at lawful age. See, upon this subject, Dart on Vendors and Purchasers of Real Estate, p. 3; Chambers on Infancy, p. 412; 1 Fonb. Eq. b. 1, ch. 3, sec. 4, and authorities on the briefs of counsel.

Let the judgment be reversed and the cause remanded.<sup>1</sup>

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<sup>1</sup> "A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be

WELLS, J., IN CHANDLER v. SIMMONS.

97 MASS. 508, 514.—1867.

ANOTHER ground relied on by the defendant is that the deed cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity, that his right is maintained. *Gibson v. Soper*, 6 Gray, 279-282; *Boody v. McKenney*, 23 Me. 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same; and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. *Badger v. Phinney*, 15 Mass. 359; *Bigelow v. Kinney*, 3 Verm. 353. Or, if he retain and use or dispose of such property after becoming of age, it may be held as an affirmation of the contract by which he

forced to become the actor, to have the contract performed. In such case the infant, or quondam infant, is under no conditions or limitations in asserting the validity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defence, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the quondam infant, or anyone asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief. *Roof v. Stafford*, 7 Cow. 179; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Bartholomew v. Finnemore*, 17 Barb. 428; *Smith v. Evans*, 5 Humph. 70; *Mustard v. Wohlford*, 15 Grat. 329; *Bedinger v. Wharton*, 27 Grat. 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still in *esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender or offer to produce or pay as the case may be. Not so, if the infant has used or consumed it during his minority. *Badger v. Phinney*, 15 Mass. 359; *Price v. Furman*, 27 Verm. 268; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 Mass. 396; *Green v. Green*, 69 N. Y. 553; *Dill v. Bowen*, 54 Ind. 204; *Phillips v. Green*, 5 T. B. Monroe, 344; *Goodman v. Winter*, 64 Ala. 410; *Roberts v. Wiggins*, 1 N. H. 73."—STONE, J., in *Eureka Company v. Edwards*, 71 Ala. 248, 256 (1881). That an infant as defendant in equity must do equity, *McGrael v. Taylor*, 167 U. S. 688.

acquired it, and thus deprive him of the right to avoid. *Boyden v. Boyden*, 9 Met. 519; *Robbins v. Eaton*, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. *Dana v. Stearns*, 3 Cush. 372-376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in *statu quo*. *Tucker v. Moreland*, 10 Pet. 65-74; *Shaw v. Boyd*, 5 S. & R. 309.<sup>1</sup>

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### DEVENS, J., IN PELLETTIER *v.* COUTURE.

148 MASS. 269, 271.—1889.

IN the case at bar, no warrant was issued against the separate estate of the petitioner, but it is his contention that, by reason of his minority, no warrant could properly have issued against the partnership property, as it was his although in connection with Couture, and that, even if the firm could be declared insolvent, his interest in the partnership property could not be taken to pay the debts of the firm. The plaintiff had, however, no property in any specific assets affected by the warrant against the firm, even if his money had passed into them and they had been purchased to some extent by it and by the credit thereby obtained. The partnership property (irrespective of his minority) could not have been attached as his. *Sanborn v. Royce*, 132 Mass. 594. Nor could it have been devoted to the payment of his private debts, except subject to the claims against the partnership. He had an interest in it to receive therefrom only what might remain after these were satisfied. *Peck v. Fisher*, 7 Cush. 386. Nor, if the plaintiff repudiated the debts which had been incurred and the purchase of this partnership property, as he did before the judge of probate, by alleging his minority and denying his liability therefor, could he properly assert any title to the partnership assets, or interest therein. This he does by urging that on account of that title or interest no warrant could issue against them.

A minor cannot discharge himself from the debt, and yet hold the property which has been obtained by incurring the debt. If he

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<sup>1</sup> See note to *Craig v. Van Bebber*, 18 Am. St. Rep. at pp. 687 and 690.



avoids his contract, and refuses to pay the price of goods which have been sold to him, the sale is annulled, and the property reverts in the vendor. *Chandler v. Simmons*, 97 Mass. 508, 514. If he enters into business with another as a partner, and contracts are made and assets thus obtained, he may deny his liability on the contracts by which they have been obtained, and release himself from the debts thus incurred. He will thus throw the liability for the whole debts on his partner, and make such partner solely responsible, but the assets thus obtained should be devoted to the satisfaction of the contracts by which they have been procured. Having placed the whole responsibility on another, having extricated himself from all liability, to allow him to retain the property, or to assert and maintain a title to it, or any portion of it, until the debts are satisfied, would be manifestly unjust.

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9. EFFECT OF AVOIDANCE WHEN ACTION IS BROUGHT, BY THE ADULT, BASED UPON THE INFANT'S AVOIDANCE.

STRAIN *v.* WRIGHT.

7 GA. 568.—1849.

WARNER, J. Two grounds of error are alleged to the judgment of the court below, in this case. First, in refusing to give to the jury the instructions asked by the counsel for the complainant. Second, in giving to the jury the instructions as set forth in the record before us.

It appears that the defendant had purchased from the complainant's intestate a negro, for which he paid a part of the purchase-money, and executed his note for the balance. At the time this contract was executed, the defendant was an infant, who took the negro into his possession. When sued upon the note given for the balance of the purchase-money for the negro, after attaining full age, he filed the plea of infancy to the action upon the note, and at the trial, sustained his plea by proof, whereupon the plaintiff in that action dismissed it.

The complainant then filed his bill, setting forth the facts of the case, and prayed for a decree to have the negro sold, and out of the proceeds of such sale to pay the defendant the amount paid by him to the complainant's intestate, and the balance thereof to be paid to the complainant.

The instructions asked by the complainant's counsel assert the proposition that the contract for the sale of the negro was dis-

affirmed by the defendant, by his plea of infancy to the action on the note, and that the title to the negro revested in the original vendor, or his legal representative, and that it was competent for a court of equity to decree a sale of the negro, so as to adjust the equitable interests of the respective parties to the contract, according to the facts of this particular case. The instructions requested were, in our judgment, correct in point of law, and ought to have been given.

(1) The contracts of infants are not void, but voidable at their election, when they arrive at twenty-one years of age. 2 Kent's Com. 235; *Roof v. Stafford*, 7 Cowen's Rep. 179. By his plea of infancy to the action brought upon the note given in part payment for the negro, the defendant disaffirmed the contract for the sale of him.

(2) An obligation or other deed of an infant shall be avoided by plea of within age. 3 Comyn's Dig. 550, letter c, 5. The plea of infancy was his own voluntary act, and manifested his intention to repudiate the contract, and he is therefore bound by it. The defendant will not be permitted to disaffirm the contract, when sued for the purchase-money by the vendor, and when the latter seeks to recover the property, in consequence of such disaffirmance, to refuse to give it up, and then insist upon such refusal as evidence of an affirmance of the contract, as was contended by the counsel for the defendant in error. When the defendant filed his plea of infancy to the contract, he made his election to disaffirm it, and he is bound by such election.

It has been insisted on the argument, that when an infant has received property by virtue of an executed contract made with an adult, that when he arrives of age and disaffirms the contract, by his plea of infancy to the note given for the property so received, the adult cannot recover from the infant, either the purchase-money for the property sold to him, or the property. Upon what legal principle this doctrine can be supported we are unable to determine; certainly upon no just principle.

(3) The infant, in this case, derived his title to the negro by virtue of the contract made with the complainant's intestate. When of age he disaffirms the contract, and it is canceled for his benefit. The contract of sale being rescinded at the instance of the infant, what becomes of his title to the property derived from the vendor? According to legal rules and common sense, it would seem that the title to the property would revest in the vendor; and yet the authorities to be found in the books upon this question are not as harmonious as might be expected. We, however, adopt the rule as stated

by Chancellor Kent. If the infant avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he has received. The privilege of infancy is to be used as a shield, and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other. 2 Kent's Com. 240. The cases of *Badger v. Phinney*, 15 Mass. Rep. 359; *Roberts v. Wiggins*, 1 N. H. Rep. 73, and *Roof v. Stafford*, 7 Cowen's Rep. 179, are cited in support of this doctrine. In *Badger v. Phinney*, the court inquire, after the contract has been rescinded, what is to be done then? "Should not the plaintiff and defendant be placed in the same situation as if no such contract had been made? But that will not do for the defendant. His notion of rescinding is to keep all and to pay nothing on the contract." So here, the defendant wishes to keep the negro, and not pay the note given for the purchase-money. The rule adopted in *Badger v. Phinney* is recognized by the Supreme Court of Alabama, in *Jefford's Adm'r v. Ringold & Co.*, 6 Ala. Rep. 548. See, also, 9 Metcalf's Rep. 519. We cannot sanction the doctrine contended for, that an infant who obtains property by virtue of a contract with an adult, may, when of age, disaffirm such contract under the law made for his protection, and then refuse to restore the property thus obtained. The law, which was intended, in the language of the authorities, as a shield for the protection of the infant, would be an instrument in his hands for offensive operations. It would enable him to act aggressively upon the rights of others, instead of enabling him to guard and protect his own rights. There is no doubt, in the view we have taken of this case, that if no part of the purchase-money for the negro had been paid to the vendor, and the note had been given for the entire amount thereof, that upon the disaffirmance of the contract by the defendant, an action of trover might have been maintained at law by the vendor, for the recovery of the property; but part of the purchase money having been paid to the vendor by the defendant for the property, the remedy of the vendor, at law, was inadequate and difficult. The peculiar facts of the case raised such an equity in favor of the complainant as gave to the court of equity jurisdiction for the purpose of settling the rights of the respective parties. The charge of the court to the jury was a denial of the complainant's right to the relief which he prayed — to have the negro sold, and out of the proceeds thereof to pay the defendant the amount paid by him, and the balance to be paid to the vendor. The contract having been disaffirmed by the defendant, such a decree, in our judgment, would have properly adjusted the rights of the respective parties, accord-

ing to the facts as made by the record before us, and ought to have been so adjudged.

Let the judgment of the court below be reversed, on the ground that the court erred in not giving the instructions as requested by the complainant's counsel, and in giving the instructions as set forth in the record.

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### *Ratification of Contracts.*

#### I. WHAT CONSTITUTES RATIFICATION.

##### THOMPSON *v.* LAY.

4 PICK. (Mass.) 48.—1826.

ASSUMPSIT on the promise of the wife before marriage. The defendants pleaded the infancy of the wife. The plaintiffs replied a ratification after she came of age and before her marriage.

The plaintiff, to prove a ratification, produced evidence that the wife, after she was of age and before her marriage, acknowledged she owed the money on the note, and said that she had not the means of paying it then, but that she would pay it as soon as she had the means, or as soon as she should be able.

On this evidence the defendants agreed to be defaulted; but if it was insufficient to maintain the action, the default was to be taken off, and the plaintiffs were to become nonsuit.

PARKER, C. J., delivered the opinion of the court. The authorities cited, especially the cases of *Whitney v. Dutch* [14 Mass. 460], and *Ford v. Phillips* [1 Pick. 203], explicitly lay down the principle that the promise of an infant cannot be revived so as to sustain an action, unless there be an express confirmation or ratification after he becomes of age.

Such a ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in the cases on the statute of limitations. A promise to pay is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise; as, if the party should say, after coming of age, I do ratify and confirm, or do agree to pay, the debt.

But a ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened, or been complied with, before an action can be sustained. I ratify and confirm my promise, provided I receive a certain legacy, or, if I succeed to a certain estate, or, if I recover a certain sum of money, or, if I draw a



prize in a certain lottery, would make a conditional promise or ratification, sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before. So an engagement or promise to pay when able is a conditional promise, and the plaintiff, to avail himself of it, must give in evidence the ability of the defendant. It would not be necessary to show any ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an income from some source which would enable the party to pay, would be sufficient.

The cases cited by the plaintiff's counsel are bottomed upon this principle. That of *Martin v. Mayo* [10 Mass. (Rand's ed.) 141] is thought to be of a different description, but we understand the court to have there explicitly admitted the principle, but to have decided that the words appended to the promise did not constitute a condition, but merely postponed the time of payment. If there was any error, which, however, we do not perceive, it was not in the principle adopted, but in the construction of the words of the promise.

Plaintiffs nonsuit.<sup>1</sup>

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### TOBEY v. WOOD.

123 MASS. 88.—1877.

MORTON, J. This is an action of contract upon two checks, dated respectively, December 2, 1872, and January 3, 1873, signed by Seth Wood & Co., and duly presented for payment, and protested for non-payment.

The defendant Humes, the only one of the signers who defends the action, was a member of the firm of Seth Wood & Co., and, when the checks were drawn, was an infant. His promise to pay the checks, therefore, was a voidable contract, and the burden of proof is upon the plaintiff to show that Humes, after he became of age, affirmed and ratified the contract. 2 Greenl. Ev. sec. 367, and cases cited. *Reed v. Batchelder*, 1 Met. 559. Such ratification may be shown, either by proof of an express promise to pay the debt, made by the infant after he became of age, (which is not claimed in this case), or by proof of such acts of the infant, after he became of age, as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt. *Boody v. McKenney*, 23 Me. 517; *Proctor v. Sears*, 4 Allen, 95; *Thompson v. Lay*, 4 Pick. 48; *Pierce v. Tobey*, 5 Met. 168; *Dublin & Wicklow Railway v. Black*, 8 Exch. 181; s. c. 16 Eng. L. & Eq. 558, and note.

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<sup>1</sup> "A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed; there should be a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied." *Goodsell v. Myers*, 3 Wend. 479.

The plaintiff contends that the facts in this case justify the finding that the defendant Humes intended to and did ratify his promise to pay these checks. These facts are, that a portion of the goods which formed the consideration of the checks remained unsold up to the time of the dissolution of the firm, which was seven weeks after Humes became of age; that during said seven weeks he drew money for his personal use, from time to time, from the firm; and that, at the dissolution, his partners, the other defendants, agreed with him that they would assume and pay all the debts of the firm. It is also agreed that, at the time Humes became of age, and until after the dissolution, he supposed that these checks were paid.

It has often been held that, if an infant purchases property, and, after he becomes of age, retains specifically the property, and uses or disposes of it, it may be an affirmance of the contract by which he acquired it, and deprive him of the right to avoid. *Chandler v. Simmons*, 97 Mass. 508, and cases cited. This is upon the ground that he can honestly retain the goods only upon the assumption that the contract by which he acquired them was valid, and therefore his retention and use of them, if unexplained, justly leads to the inference of a promise or undertaking to pay for them, after his incapacity to make contracts is removed. *Todd v. Clapp*, 118 Mass. 495.

But this rule cannot apply in the present case, because it is not shown that Humes knew that any of the goods, which were the consideration of the checks, remained undisposed of at the time he became of age, and it is shown that he supposed that the checks had been paid. Under these circumstances, there is no foundation for an inference of a promise by him to pay the checks. *Smith v. Kelley*, 13 Met. 309.

The facts that Humes remained in the firm for several weeks after he became of age, drawing money from time to time, for his personal use, and that when he retired he took an agreement from his partners that they would pay all the debts of the firm, are relied upon by the plaintiff as showing an affirmance of the checks. But we are of opinion that these facts do not afford sufficient proof of such affirmance. In this connection, it must be borne in mind that Humes supposed these checks to have been paid. In the absence of an express promise to pay, an affirmance can only be shown by unequivocal acts of the defendant, after he became capable of contracting, which show his intention to pay the debt. How far these acts of Humes might tend to show an intention on his part to ratify such debts of the firm as were within his knowledge, need not be considered. It would be forced and unreasonable to infer from them an intention and promise to pay a debt which he supposed had

already been paid. *Crabtree v. May*, 1 B. Mon. 289; *Minock v. Shortridge*, 21 Mich. 304; *Dana v. Stearns*, 3 Cush. 372.

It is argued that the taking an agreement of indemnity from his partners implies that he was liable for the debts of the firm, and is therefore evidence of a promise to ratify and pay such debts. This is not necessarily so. The contract of indemnity may have been necessary for his protection against debts of the firm contracted after he became of age. But if this act is to be regarded as evidence that he supposed himself liable for all the debts of the firm, it is not of itself sufficient proof of a ratification. The act relied on as a ratification of a promise made during infancy must amount to, or be sufficient evidence of, a promise or undertaking to pay the debt. *Smith v. Kelley*, 13 Met. 309.

Perhaps if an infant member of a firm should, after he became of age, buy out his partners, take the property of the firm, and agree to pay all the debts of the firm, this might amount to a ratification of his promise to pay all the firm debts, whether known or unknown to him. It would be a clear expression of his intention and undertaking, after he became competent to bind himself, to affirm and pay such debts. But taking from his partners a promise that they will pay the debts does not imply an intention on his part to pay them. It implies that he desires and expects that they will pay the debts, and is as consistent with an intention on his part to avail himself of the defence of infancy, as of the intention to waive that privilege. Upon the whole case, we are of opinion that the facts do not justify a finding that the defendant Humes, after he became of age, ratified or promised to pay the checks in suit.

Judgment for the defendant Humes.

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### LAWRENCE, J., IN *MCCARTY v. CARTER*.

49 ILL. 53, 54.—1868.

THIS was a petition to establish a mechanic's lien, brought by Carter, the appellee, against Samuel McCarty, Emily A. McCarty, his wife, and Lucy J. Davis, the daughter by a former husband of said Emily A. McCarty. The lot upon which the building had been erected belonged to the daughter, subject to a right of dower in her mother. The appellee had made his contract in writing with Samuel McCarty. On the hearing, the court gave for the complainant the following instruction:

"If the jury shall believe, from the evidence, that the contract in question was made by McCarty on behalf of himself and Mrs. Mc-

Carty and Lucy J. Davis, and that he was authorized by them to make the same, (and that after the said Lucy J. became of age she received the rents and profits of the building erected under the contract, or any part thereof), then such contract is binding, although their names do not appear in it, and it does not, on its face, purport to be their act."

The principle embodied in this instruction was repeated in several others, and we will first consider it in regard to the infant appellant. The lien in this class of cases arises from work done or materials furnished under an obligatory contract, and if the contract ceases to be binding the lien necessarily fails. An infant is not bound by his contract, except in certain cases, to which the erection of a building for rent does not belong. A conveyance or mortgage by him of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property, indirectly, by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly attained his majority may be as able, in fact, to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age. We, therefore, hold it immaterial whether Lucy J. Davis, being then a minor, authorized McCarty to make this contract or not.

Neither do we consider her receipt of rents, after she became of age, such a ratification of the contract of McCarty, even though made, as the instruction says, in her behalf, as would operate to create a lien against her. Ratification by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words. But it would be unreasonable to compel a minor to choose between the utter abandonment of his property and the creation of a lien upon it under a contract made during his minority and to say, if he retains the property he ratifies the lien. If we were to hold that the mere receipt of rents amounted to a ratification, we should be tak-



ing from the minor the protection which the law designs to give him, for the builder might safely assume the minor would continue in the possession of his own property, and thus, by ratification, create a lien which the statute had not given when the contract was made. The builder might thus make what contract he could with the minor, under the assurance that, though the contract was not binding and the statute gave him no lien, one would nevertheless be worked out for him by a necessary ratification.

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### HATCH *v.* HATCH'S ESTATE.

60 VT. 160.—1887.

VEAZEY, J. Exceptions were taken to the judgment rendered upon the auditor's report, in which the facts are concisely stated. The plaintiff was the mother of Lura E. Hatch, deceased, and claims to recover the items of her account in controversy on the ground of a contract between the mother and daughter, while the latter was a minor of sixteen years of age, and a ratification of the same after she became of full age. The first item, including interest to September 1, 1886, was \$720.20, for money which the plaintiff paid for school expenses of Lura while attending academies.

We think the report shows a distinct agreement on the part of Lura to repay her mother for these expenses. Upon the facts reported the agreement was a natural one to be made, and was in its nature beneficial to the minor. The mother clearly could not afford to give her daughter the higher education which she desired. The latter had the means to be devoted to such use by the devise to her by her father, but not in ready money. The finding of the auditor is incapable of a fair construction other than of an agreement as above stated, when taken in connection with the circumstances existing when the arrangement was made.

The defendant relies mainly upon the claim that this contract was not ratified after Lura arrived at her majority. The finding of the auditor is this: "After Lura became of age, and while still attending the seminary at Montpelier, she reiterated to her mother her desire to go to school there and her willingness to pay the expenses incident thereto from her own share, and referred approvingly to her former promise to that effect during her minority. She told her mother she wished this arrangement to continue as it had been before she came of age." There is no question but that the contract, by which a debt is incurred by an infant, may be ratified by an express promise to pay the debt, made by the infant, when he

becomes of age, deliberately and with knowledge that he is not liable by law. To this extent the cases agree. Beyond this they are not entirely harmonious, at least in the enunciation of what is required to constitute ratification. As illustrations, see *Smith v. Mayo*, 9 Mass. 62, and *Whitney v. Dutch*, 14 Mass. 457.

There are many cases which hold that although an express ratification is necessary, yet it is not required to be in the form of an express new promise. *Tibbitts v. Gerrish*, 5 Foster (N. H.), 41, and *Harris v. Wall*, 1 Exch. 122, are examples. Acts and declarations of one after attaining majority, in favor of his contract, may be of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise. Mere acknowledgment of the contract, or partial payment, will not alone be sufficient. There must either be an express promise to pay, or such a direct confirmation as expressly ratifies the contract, although it be not in the language of a formal promise. *Wilcox v. Roath*, 12 Conn. 551; *Gray v. Ballou*, 4 Wend. 403; *Whitney v. Dutch*, *supra*. The cases in Vermont have not recognized the necessity of an express promise in terms in order to constitute ratification of an obligation incurred during infancy. Where the declarations or acts of the individual after becoming of age, fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part made during infancy, and intended to pay the debt, then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable. This proposition is clearly within the scope of decisions in a long line of approved authorities, cited in Tyler on Infancy and Coverture (2d ed.) chap. VI, and 1 Am. Lead. Cases, p. 250.

The Vermont cases plainly warrant us in holding that the above conditions are sufficient. In *Bigelow v. Kinney*, 3 Vt. on p. 353, Prentiss, Ch. J., says: "Though it is laid down that a bare acknowledgment or recognition of the contract of an infant, after he becomes of age, without an express promise, will not, where the contract is for the payment of money, or the performance of some personal duty, and remains executory, amount to a ratification; yet in general, an express act done under a contract of his infancy implying a confirmation of it, has been held to be sufficient." See, also, *Forsyth v. Hastings*, 27 Vt. 646. Regarding these conditions as not only sufficient but required, we think they are all covered by the finding of the auditor. Taking that which she said to her mother after arriving at full age, and while still at the seminary, in connection with the

unmistakable understanding between the parties during the infancy, and all the circumstances the conclusion seems to us irresistible that there was a mutual understanding that Lura would not only repay her mother for the future advances, but would pay the past advances as she had first promised. She then called the first arrangement "her former promise," and told her mother she wished it to continue as it had been before she became of age.

When the minds of contracting parties meet and they both understand that by what is said it is intended that it should be taken as an assumption of an obligation and a promise to pay, it is the equivalent of a promise in terms.

There is no question but Lura spoke deliberately and without duress in any form; and we think it is plain that she spoke understandingly as to her legal liability. It has been held that in the absence of any proof to the contrary, it is to be presumed, that at the time of making the new promise, the person, lately an infant, was aware of his rights. *Taft v. Sergeant*, 18 Barb. 321. This would seem to be the natural presumption. But however this may be, the language of Lura, under the circumstances in which it was spoken, imports such knowledge. It is difficult to see what should lead Lura to renew her promise as to the payments in her behalf during infancy except upon the theory of knowledge that such renewal was necessary to create legal liability. She was then at the seminary, her contemplated education incomplete, and no change from the previous condition except that she had attained her majority. She then brings the matter up, reiterates her desire to go on, and, in effect, renews her former promise so as to make the renewal applicable as to past as well as for future advances. She had the education which about two years in the academy would bring, after having passed through the common school. We come to the conclusion of her knowledge of the legal situation without hesitation.

The plaintiff further claims to recover for an organ which the auditor finds she bought for Lura in 1872, when the latter was about sixteen years old, at her request, and which Lura claimed and treated as her own from its purchase till her death in 1877; and it was so regarded in the family. Lura's home was always at her mother's, and the organ was kept there, except that Lura had it with her when away at school for a short time. The auditor says he does not find there was any express contract by Lura to pay any of the expenses incurred by her mother for her, except those incident to her schooling.

We think these findings are insufficient to warrant the holding of

the relation of debtor and creditor between Lura and her mother. There was no appointed guardian, and they held the ordinary relation of parent and child. The only ground for holding that the purchase of the organ created an indebtedness is that the mother bought it at the request of the daughter. While that might be sufficient as between strangers, we think it is not sufficient as between parent and child; especially in reference to such an article and under the circumstances shown in the report. There is not enough shown to distinguish the case from the ordinary one, where the parent indulges the request of a child.

The plaintiff also claims to recover for nursing Lura in her last sickness, and for the physician's bill. This claim is clearly without legal foundation.

Neither can she recover for the burial expenses of Lura. These belong to the administrator of her estate to pay. This case is an appeal from the allowance of commissioners on claims against Lura's estate, and the jurisdiction is limited to claims accruing during the lifetime of the deceased. *Sawyer v. Hebard*, 58 Vt. 375.

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The judgment is reversed, and judgment is rendered for the plaintiff for the item of \$720.20 and interest thereon, and costs in this court; the cost previous to be apportioned. Let this judgment be certified to the Probate Court.<sup>1</sup>

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## 2. WHETHER RATIFICATION MUST BE MADE WITH KNOWLEDGE OF NON-LIABILITY.

### MORSE AND ANOTHER *v.* WHEELER.

4 ALLEN (MASS.), 570.—1862.

CONTRACT to recover the balance due on a purchase of cattle made of the plaintiffs by the defendant, who was an infant at the time of the purchase.

At the trial in the Superior Court, there was evidence tending to show that the defendant, after becoming of age, promised to pay the balance due to the plaintiffs; and Ames, J., instructed the jury that if they believed this evidence the plaintiffs were entitled to recover. The defendant requested that this instruction might be qualified, by adding that the plaintiffs were entitled to recover, "provided the defendant knew at the time of such alleged new promise that he was not legally liable to pay the debt." The judge declined to add

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<sup>1</sup> In some states the ratification is required to be in writing. See *Stimson Am. St. Law*, § 4147.



this qualification, but stated that, as the defendant was of full age at the time of the alleged ratification, he must be presumed to know his legal liabilities and privileges, and could not avail himself of a mistake of law on his part.

METCALF, J. This case brings before the court, for the first time, the question whether it is necessary to the ratification of an infant's promise, after he is of full age, that he should know, when he makes the new promise, that he is not legally liable on the other. It is said in numerous books that such knowledge is necessary to such ratification. But we are all of opinion that it is not necessary, either on principle or authority.

It is a long-established legal principle, that he who makes a contract freely and fairly cannot be excused from performing it by reason of his ignorance of the law when he made it. 2 Kent's Com. (6th ed.) 491, note; 1 Story on Eq. sec. 111. If, however, an exception to the application of that principle to a case like this has been authoritatively made, the defendant is entitled to the benefit of it. But we do not find that such an exception has ever been made by any judicial decision, unless it be in a case in Pennsylvania, reported in 3 Barr, 428. The notion of such an exception had its origin in the opinion of Lord Alvanly, as reported in the case of *Harmer v. Killing*, 5 Esp. R. 102. That was an action for goods sold and delivered, to which there was a plea of infancy, and a replication of a promise after full age. The evidence was, that the defendant, after he attained full age, on payment being demanded of him, and on being threatened with an arrest, promised to give his note for the goods, but afterwards refused to give it. Lord Alvanly said that the defendant "might bind himself by a new promise after he obtained his full age, but that he held that such promise must be voluntary, and given with knowledge that he then stood discharged by law; that where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, he should hold that he was not bound to it. If, therefore, the jury should be of opinion that the facts were that this promise was so obtained, he should direct them to find for the defendant." But, as no evidence was given, nor question made, concerning the defendant's knowledge of his rights, it is manifest that the only adjudged point in the case was, that his promise was made under a duress *per minas*—threats of unlawful imprisonment—and that he might avoid it for that reason. See *Inhabitants of Whitefield v. Longfellow*, 13 Maine, 146; 1 Parsons on Con. (3d ed.) 320. That case was first published in 1807. And the *obiter dictum*, as well as the adjudicated point in the case, has been transferred

into most of the books of a later date, English and American, which treat of the ratification of an infant's contract. Yet we have found no case in the English reports in which the question has been raised, whether it is necessary to the ratification of such contract that the new promise should be made with knowledge that the party was not legally liable on his original contract. And we find only one instance in which an English judge is reported to have expressed an opinion that such knowledge is necessary. According to the report of the case of *Mawson v. Blanc*, in 26 Eng. Law & Eq. R. 560, Baron Martin said that "a ratification is an undertaking by a person after he becomes of full age, and expresses that, notwithstanding he is aware that the contract, which he entered into when an infant, is void, he nevertheless is willing to affirm it and treat it as valid." So much of this *dictum* as recognizes the necessity of a party's knowledge that he is not bound by his contract made during infancy, in order to make his new promise a legal ratification, was extra-judicial, and is not contained in his opinion in the same case, as reported in 10 Exch. 212.

In the courts of our own country, we are aware of only one case, besides the present, in which counsel ever raised the question now before us. In *Taft v. Sergeant*, 18 Barb. 320, the defendant's counsel contended that his new promise was not a ratification, because there was "nothing to show that, at the time it was made, he knew that he was not liable by reason of his infancy." The decision of the court was, like the ruling at the trial of the present case — not that such knowledge was necessary, but that the defendant was "presumed to know the law."

Still, there are cases in the state courts in which judges have cited, with apparent approval, the position advanced by Lord Alvanly — citing the case of *Harmer v. Killing*. In other cases, judges have advanced the same position, without referring to any authority. See *Smith v. Mayo*, 9 Mass. 64; *Ford v. Phillips*, 1 Pick. 203; *Thing v. Libbey*, 16 Maine, 57; *Curtin v. Patton*, 11 S. & R. 311; *Reed v. Boshears*, 4 Sneed (Tenn.), 118; *Norris v. Vance*, 3 Rich. (S. C.) 168. In no one of these cases was a decision of that point necessary, and they were all decided on other grounds. The decision, however, of the Supreme Court of Pennsylvania, in the unreasoned case of *Hinely v. Margaritz*, 3 Barr, 428, affirming the judgment of the Court of Common Pleas, seems necessarily to affirm the *obiter dictum* of Lord Alvanly, which had before been extra-judicially recognized by Duncan, J., in *Curtin v. Patton*. But, with our views of the law, already stated, we cannot adopt that decision for our guidance.

Even if it had been adjudged, in 5 Esp. R. 102, that knowledge of

an infant's rights was necessary to the ratification of his contracts after he becomes of age, such judgment would have been virtually overruled by the numerous cases decided since, in which the requisites of a ratification have been judicially stated, without mention of such knowledge. And if such knowledge be necessary to the ratification of an infant's contract, by a new promise after coming of age, why is it not necessary in those cases of ratification, not by promise, but by acts done or omitted? We see no difference in principle between the cases.

It may not be wholly useless to say, that in Selwyn's *Nisi Prius*, Roscoe on Evidence, and Addison on Contracts, the case of *Harmer v. Killing* is cited only to the point there adjudged, to wit, that a ratifying promise must be voluntary and not extorted, omitting the extra-judicial *dictum*. See, also, Ram on Legal Judgment, c. 5, of *Dicta Expressed on the Bench*.

Exceptions overruled.<sup>1</sup>

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### 3. RECOVERY UPON THE RATIFIED PROMISE.

#### HUNT *v.* MASSEY.

5 B. & AD. (ENG.) 902.—1834.

**ASSUMPSIT** by the plaintiff, as drawer of a bill of exchange dated the 1st of February, 1832, for £101, payable five months after date, and accepted by the defendant. Plea, general issue. At the trial before Denman, C. J., at the London sittings after last Michaelmas term, the following appeared to be the facts of the case: The defendant accepted the bill of exchange in February, 1832, being then under age; he became of age on the 19th of June, and the bill became due on the 4th of July, 1832. The following letter, in the defendant's handwriting, bearing date the 22d of June, 1832, addressed to his guardian, was given in evidence: "I request you to pay to Mr. W. H. Hunt, £101, at your earliest convenience after the date of this letter, from the money left me by my late grandfather, Robert Andrews, Esq., for which I have given my bill." This letter had been delivered by the defendant to the clerk of the plaintiff, as stated in his examination in chief, on the day it bore date: on this cross-examination he stated he could not state the precise day when it was delivered. It was objected that it ought to have been clearly shown that the letter was written after the defendant became of age: secondly, that the letter did not amount to a promise to pay the bill; and thirdly, that the plaintiff ought to have

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<sup>1</sup> Accord, *Bestor v. Hickey*, 71 Conn. 181. But see *Owen v. Long*, 112 Mass. 403.

declared specially; because the plaintiff was liable, if at all, not by reason of his acceptance of the bill, but of a promise made after he had come of age. The lord chief justice directed the jury to find a verdict for the plaintiff.

Platt now moved for a new trial, and contended, first, that some evidence ought to have been given to show that the letter was written at or about the time it bore date, or, at least, before the defendant attained his full age; secondly, that the language of the letter did not amount to a promise to pay, but a mere request to a third person to pay on the defendant's account a sum of money to the plaintiff out of a particular fund; and, thirdly, that if the letter did amount to a promise to pay, it did not support any count in the declaration. The contract in the special count to pay according to the tenor and effect of the bill of exchange, was alleged to have been made on the 19th of June. If the letter amounted to a promise, that promise was made on the 22d of June.

[TAUNTON, J. Where a voidable contract is made by a party under age and ratified after he has attained his full age, is it not usual to declare on the original promise? The first promise here was voidable, only. *Gibbs v. Merrill*, 3 Taunt. 307. As soon as it was ratified, it became binding *ab initio*. PATTESON, J. If the defendant had pleaded infancy specially, the plaintiff might have replied, that after he had attained the age of twenty-one years, he assented to and ratified and confirmed the several promises in the declaration. And the letter would be good evidence to support that replication, for it is an order to the defendant's agent to pay the very money for which he had given the bill. LITTLEDALE, J. The case might be different if the defendant had become of age, and written the letter, after the bill had become due; then, perhaps, he could not be said to have promised to pay according to the tenor and effect of the bill of exchange].

DENMAN, C. J. The letter must be presumed *prima facie* to have been written on the day on which it bore date. It lay on the defendant to show that it was not; and if so, it then amounted to a ratification of the original promise to pay, according to the tenor and effect of the bill of exchange, and might be declared on accordingly.

LITTLEDALE, TAUNTON and PATTESON, JJ., concurred.

Rule refused.<sup>1</sup>

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<sup>1</sup> "The promise made to pay a debt contracted during minority, in legal effect is a waiver of the defence of infancy, and an election to consider it valid. It is consequently immaterial whether the original contract was entered into by deed or other less solemn writing; a verbal adoption of it, after the party who



*Non-Voidable Contracts.*THE PEOPLE *v.* MOORES.

4 DENIO (N. Y.), 518.—1847.

DEBT on a bastardy bond in the penalty of \$500, conditioned that the defendant Daniel B. Moores, the father of the child, would indemnify the city of New York, where the child had been born, and every other county, etc., which might be put to any expense for the support of the child, or of its mother during her confinement and recovery therefrom, against all such expenses. Breach, that the defendant had not indemnified the city of New York, etc., and the city, after the making of the bond, had been obliged to expend divers large sums of money for the support of the child, etc. Plea, by the defendant Daniel B. Moores, the father of the child, that he was an infant within the age of twenty-one years at the time of the making of the writing obligatory. Replication, setting out regular proceedings for the arrest of the said Daniel B. as the reputed father of the child, his arrest, an order of filiation, and that the said Daniel B., with his father Daniel Moores, thereupon entered into the bond in question; whereupon the justices discharged the said Daniel B. from his arrest; concluding with a verification. Demurrer and joinder.

BRONSON, CH. J. When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation. If this be not a

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assumed the duty came of age, would be quite as effectual as a promise under seal to pay, or perform it. This being the case, it is clear that the defence of infancy being excluded, the voidable contract becomes valid from the time it was made, and may be declared on without noticing the subsequent confirmation further than to reply it, if infancy should be pleaded." *West v. Penny*, 16 Ala. 186, 191.

"The minor, on coming of age, may, however, fail or decline to assent to a confirmation of the first agreement, but may be willing to make himself liable upon a new express or implied undertaking, based on the original consideration. He may, expressly or by implication, agree to terms which necessarily create a conditional, qualified, or restricted liability, and, in such case, the first agreement is not ratified by the second. A new agreement is constituted which is operative only from the time of its creation, and effective according to its nature. If the promise or act of the party after majority amounts to a conditional ratification instead of a new substantive engagement, the contract made during minority may then be enforced, but not until the condition is fulfilled." *Minock v. Shortridge*, 21 Mich. 304, 316.

[DOMESTIC RELATIONS—30.]

general rule, it is at the least one of pretty wide application, as a few examples will prove. An infant is bound to pay a judgment, or a debt contracted for necessities; and he may make a valid promise to refund the money to any one who will satisfy the judgment or debt. *Clarke v. Leslie*, 5 Esp. R. 28; *Randall v. Sweet*, 1 Denio, 460. An infant is under legal obligation to provide for the support of his wife and children, and he is answerable on his contract for necessities furnished to them. *Turner v. Trisby*, 1 Stra. 168; Bull. N. P. 155; Reeve's D. R. 234. After an order of filiation, an infant is bound by law to support his illegitimate child (1 R. S. 642, sec. 2); and there can be no doubt but that his promise to pay for necessities furnished to the child would be valid. The statute also obliges an infant to indemnify the city, town, or county, against the expenses of supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties for that purpose, as the only means by which he can obtain a discharge from arrest (*Id.* p. 645, secs. 14, 15); and I think the statute has given him a legal capacity to make a binding obligation. In *Baker v. Lovett*, 6 Mass. 80, Parsons, Ch. J., said infants are bound by all acts which they are obliged by law to do. See, also, *U. S. v. Bainbridge*, 1 Mason, 83; *The People v. Mullin*, 25 Wend. 698; *Winslow v. Anderson*, 4 Mass. 376. We are of opinion that infancy is not a good defence to this action.

Judgment for the people.<sup>1</sup>

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### SAMPSON, C. J., IN *WATSON v. CROSS*.

2 DUV. (KY.) 147.—1865.

THIS action was brought against appellant to recover, specifically, a watch and trunk, or their value, which are alleged to be the property of appellee, who sues as an infant. Appellant answers, and claims that, in 1860, at the time said property came to his possession, he was a licensed innkeeper in Frankfort; that appellee became his guest, and remained with him two weeks; that his entertainment, for that time, was worth \$28; that he also loaned him \$15 to go after his trunk, and \$12 to pay his traveling expenses to Maysville, where he resided; and claims that he has a lien on the watch and trunk, as an innkeeper; and that, in addition thereto, appellee also pledged them as security for the payment of the above named sums of money, amounting to \$55.

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<sup>1</sup> See, also, the statement of *Starr v. Wright* in *Lemmon v. Beeman*, reported herein, *supra*.

It appears that appellee was an infant, and had been placed by his guardian at the Kentucky Military Institute, near Frankfort; but that he left there and came to Frankfort, staid at the hotel of appellant for two weeks, and then went to his home at Maysville, no doubt using the money furnished by appellant in payment of his traveling expenses, for it is manifest that he had none of his own.

The causes were transferred to equity, and the Circuit Court on final hearing rendered a judgment for appellee for the value of the watch, chain, and trunk, to reverse which this appeal is prosecuted.

It is contended that appellee, being an infant, and his guardian having provided for him at the Military Institute, and he having absented himself therefrom without permission, appellant is not entitled to recover for his entertainment or for the money furnished him.

Appellant, being an innkeeper, was legally bound to receive and entertain all guests apparently responsible and of good conduct, who might come to his house; and, if he refused to do so, he was liable alike to an indictment and an action by the party aggrieved; and the mere fact of infancy alone in the applicant would not justify him in any such refusal. As the application of appellee for entertainment was not, so far as the proof discloses, attended with circumstances which showed that he was acting in disregard of his guardian's wishes, and there is no evidence that appellant knew that was the case, he would not have been justified in refusing him merely because of his infancy and consequent legal disability to contract, and especially, as the proof tends to support the allegation of the answer that he had the appearance of a person fully grown. Under the facts as presented before him, he might well conclude that it was his legal duty to receive appellee as a guest, and that being the case, the contract was, on his part, compulsory, and the law will not render such a contract on the other side either void or voidable, upon the simple ground of disability arising from infancy. Where a party voluntarily contracts with an infant, then the infant may avail himself of his legal disability and avoid the contract, if not for necessities; but to apply the principle to contracts which are compulsory on the side of the other contracting party, would be to make the law an instrument of oppression. It would be a legal absurdity to compel a man to make a contract, and, at the same time, permit the other party, who is the instrument of such compulsion, to avoid such contract.

*Non-Voidable Contracts: Necessaries.*

## I. IN GENERAL.

JOHNSON *v.* LINES.

6 WATTS &amp; SERG. (PA.) 80.—1843.

EDWARD L. LINES and William W. Scott, trading under the firm of Lines & Scott, against David Eckert, administrator of John Johnson.

This was an action of assumpsit. The declaration contained the common-money counts; to which the defendant pleaded that the intestate was an infant at the time of the supposed promises; and the plaintiffs replied that the goods provided were necessities.

GIBSON, C. J. The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessities, but which ill deserve the name. Their account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessities when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket-money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessities. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue that the rule of the common law on the subject be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man — which fit him for a useful life or send him to an untimely grave; and public policy demands that they who deal with such a customer should do so at their peril. This enormous bill was run up at one store; and what other debts were contracted for supplies elsewhere, we know not; but let it not be imagined that the infant's transactions with other dealers did not



concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson, in *Burghart v. Angerstein* (6 Car. & P. 700), "you may look at the bills of the other tradesmen by whom the defendant was also supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessities suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessities proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril. In *Ford v. Fothergill* (1 Esp. R. 211; s. c. Peake's N. P. C. 299), Lord Kenyon ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parent or friends. That case may be thought to have been shaken in *Dalton v. Gib* (5 Bing. N. C. 198), in which it was held that inquiry is not a condition precedent to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in *Brayshaw v. Eaton* (Id. 231), this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of nonsuit; but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and, consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward, ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case, the supply of articles which were proper in kind, was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be *sui juris*; but I certainly do blame the jury for finding nearly the whole demand, after it had been conceded that he was an infant.

That the charge, though not palpably wrong in the abstract,

tended to mislead in its application to the facts, is visible in the verdict it produced. The defendant went to the court for direction that the plaintiffs could not lawfully deal with the infant, even for necessities, unless the guardian had refused to furnish them; and had, for response, a direction that "the plaintiffs had no right to deal with the deceased, unless by the permission, express or implied, of the guardian; or unless the guardian had refused to furnish necessities for his ward." This very significant addition to the principle assumed in the prayer was meant to indicate a liberty to deal by permission beyond the bounds of necessities, or it meant nothing. It indicated that an authority to deal with a minor in a way to charge him personally emanate from this guardian's permission, which is paramount, or at least equal, to the authority so to deal with him, that emanates from his necessities. The jury would naturally so understand it. And this was predicated in reference to the question before them, whether the ward's estate could be subjected to payment for luxuries. They might readily understand, therefore, that the guardian's permission to run up this bill would charge the ward's estate with it, independently of its propriety. If that was not the drift of the direction, it is not easy to see why anything was said about permission at all. In a case of doubtful propriety, I can readily understand how the guardian's sanction, or that of a relative, might justify a supply beyond the limits of strict necessity, which a dealer might furnish *bona fide* on the credit of the ward; but though the guardian might subject himself to payment of a grossly improvident bill, by a permission amounting to an order, his connivance at an improper supply by a tradesman would not subject the ward to payment of it. Indeed, it has been said (3 Wils. Bacon, 595, in marg.) to have been several times decided, that where credit has been given to the parent or guardian, the creditor has no recourse to the infant. The guardian is set over the ward for the very purpose of preventing him from making such a bill; and his desertion of his trust would not help the case of one who had dealt with the ward *mala fide*. As, then, the plaintiffs were bound to know that the guardian abused his trust in allowing the infant to run up this bill, they can recover no more of it than was proper to relieve the ward's necessities. This notion that the guardian's permission might legitimate the demand, may have had a misleading influence on the jury; for a passive acquaintance with the transaction, which the law would presume from his duty to have an eye on the doings of the ward, would be a constructive permission; or it might be implied from the fact that he had left the ward to shift for himself.

Again. The defendant prayed direction, "that if the plaintiffs were justifiable in dealing with the ward, the bill is so exorbitant that the plaintiffs themselves could not have considered them (the goods) necessities; and that they are therefore not entitled to recover;" in answer to which, the court charged that "what are necessities, is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances and pursuits of the minor. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of the items necessary: some of them, they must have known, were not necessary. The plaintiffs cannot recover for what were not necessities." Not a word in this in response to the prayer for direction as to the effect of the plaintiff's consciousness that the supply was extravagant; though consciousness would affect them with *mala fides*, and deprive them at once of whatever merit they might otherwise pretend to have from the guardian's implied sanction. The judge said truly, that what are necessities is a question mixed of fact and law; but he did not say, as he might, and perhaps ought to have done, that an oversupply of goods, otherwise proper, ceases to be a supply of necessities as to the excess. The jury were, indeed, left to say what were necessities; but rather as regards the sort than the quantity, in respect to which the effect of excess was overlooked throughout. Had it been properly impressed, the jury could not have found more than a fourth part of the bill. To them doubtless, belongs the question of extravagance; but where the supply has been so grossly profuse as to shock the sense, it is the business of the judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary.

Judgment reversed, and a *venire facias de novo* awarded.<sup>1</sup>

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## 2. FOR THE INFANT'S FAMILY.

### CANTINE *v.* PHILLIPS.

5 HARR. (DEL.) 428.—1854.

THIS was an action of assumpsit by a father-in-law, against the representatives of a deceased son, for board and other necessities furnished his wife, (plaintiff's daughter) and her child and nurse. There were also charges for board of the son-in-law.

The case turned on the question, whether an assumpsit was implied in law under the circumstances, as between parties bear-

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<sup>1</sup> As to necessary averments in the declaration, and for a statement as to when the infant and when the parent is liable, see *Goodman v. Alexander*, 165 N. Y. 289.

ing this relation to each other. It was twice tried, and resulted finally in a verdict for the defendant.

*By the Court.* Assumpsit by a father against the estate of his son-in-law, for the board and lodging of the daughter and her child and servant, and also of the son-in-law himself.

It is alleged that James W. Phillips, having married the daughter of Cantine, did, at various times and for considerable periods, live in the family of the wife's father; for which a compensation is demanded in this action.

1. On the part of the defendant it is contended that no action can be sustained on such a claim, founded on any implied engagement to pay board. That as between father and daughter, or daughter's husband, living in the father's house, no contract can be implied for the payment of board.

The court assents to this proposition. Persons in such a near connection as father and children do not usually live together upon a footing of obligation to account with and pay for attentions and services, or board and lodging. When the parties intend to live in that way, it is but reasonable to require that there should be an express understanding between them to that effect. That is what is meant by the distinction between an express and an implied contract; and that does not mean a bargain in so many words to pay so much money weekly; but the recognition of this kind of understanding between them, as the admission of the party that he was a boarder and not a guest; the payment of money as board, etc.

We therefore express the opinion, that unless such an understanding or agreement existed between the father and his son-in-law, as a matter of contract, the plaintiff cannot recover in this case.

2. If these parties lived together without such understanding, but upon the expectation or promise of a gratuity, by way of gift or present, the plaintiff could not recover such gratuity in an action.

3. But it is further alleged, on the defendant's part, that if any contract had been proved to pay board, such contract was made by Phillips when he was under age and did not bind him. That is the case with the general contracts of minors. Being regarded by the law as infants, until the age of twenty-one, such persons are incapable of making general contracts; but there are certain contracts, which, from necessity, they are allowed to make, and that is, for necessities for themselves and family. The same necessity exists as to the family of an infant; and if old enough to contract marriage, an infant is liable on contracts for the necessary board and lodging of his wife and children. And if such liability exists, it may be enforced against the infant's estate, though he die under age.



## 3. OBLIGATION QUASI-CONTRACTUAL.

TRAINER *v.* TRUMBULL.

141 MASS. 527.—1886.

C. ALLEN, J. The practical question in this case is, whether the food, clothing, etc., furnished to the defendant were necessities for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances. That is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied. *Angel v. McLellan*, 16 Mass. 28; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Cush. 512; *Barnes v. Tove*, 13 Q. B. D. 410. So, on the other hand, the mere fact that an infant, as in this case, had a father, mother, and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation; just as in the case of a lunatic. 1 Chit. Con. (11th Am. ed.) 197; *Hyman v. Cain*, 3 Jones (N. C.) 111; *Richardson v. Strong*, 13 Ired. 106; *Gay v. Ballou*, 4 Wend. 403; *Epperson v. Nugent*, 57 Miss. 45, 47. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessities, the real value will be inquired into, and he will be held only for that amount. *Earle v. Reed*, 10 Met. 387; *Locke v. Smith*, 41 N. H. 346; Met. Con. 73, 75.

But it is contended that the board, clothing, etc., furnished to the defendant were not necessities, because he, "being a pauper and an inmate of an almshouse, was supplied with necessities suitable to his estate and condition, and, under the circumstances, it would have been the duty of the guardian to place him in the almshouse." It is true that a guardian is not obliged to provide for the support of his ward, when he has no property of the ward available for that purpose; and, if he has no other resource, no doubt he may, under such circumstances, place the ward in an almshouse. The authori-

ties cited for the defendant go no further than this. *Spring v. Woodworth*, 2 Allen, 206. But this by no means implies that a boy with an expectation of a fortune of \$10,000 should be brought up in an almshouse, if any suitable person will take him and bring him up properly, on the credit of his expectations. On the other hand, it seems to us highly proper for a parent or guardian, under such circumstances, to do what the father did in this case; leaving it for the boy's guardian to see to it that an unreasonable price is not paid. Looking to the advantage of his subsequent life, as well as to his welfare for the time being, his transfer from an almshouse, to a suitable person, by whom he would be cared for and educated, would certainly be judicious; and the support and education furnished to an infant of such expectations, whose means were not presently available, fall clearly within the class of necessities. In Met. Con. 70, the authority of Lord Mansfield is cited to the point that a sum advanced for taking an infant out of jail is for necessities. *Buckinghamshire v. Drury*, 2 Eden, 60, 72. See, also, *Clarke v. Leslie*, 5 Esp. 28. Giving credit to the infant's expectation of property is the same as giving credit to him. There was no error in refusing to rule, as matter of law, that, upon all the facts in evidence, the action could not be maintained. The findings of all matters of fact, of course, are not open to revision.

Exceptions overruled.

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#### 4. WHAT ARE NECESSARIES.

### NEW HAMPSHIRE MUT. FIRE INS. CO. *v.* NOYES.

32 N. H. 345.—1855.

ASSUMPSIT on the premium note of the defendant for the sum of forty dollars, made December 7, 1847, payable to the plaintiffs, in such portions and at such times as their directors might, agreeably to the act of incorporation, require.

The plea was infancy; to which the plaintiffs replied, first, that the defendant, after he became of age, ratified and confirmed his promise; and, secondly, that the note declared on was given for necessities. Issue was joined upon both, and the case submitted for decision upon an agreed statement of facts.

FOWLER, J. \* \* \* The remaining question we have carefully considered. For, as has been well suggested by the plaintiff's counsel, although an infant might not be liable to pay for the goods constituting his stock in trade, yet, having the goods, and being so en-

gaged in trade, it would manifestly be for his interest, and would seem almost necessary for the security of his property, that it should be insured against loss or damage by fire. But it is evident from the most cursory examination, that the contract being advantageous or disadvantageous to the infant or his estate, furnishes no reliable test on the point, as to whether or not the subject matter of such contract is properly included within the term necessities. Very many things can be mentioned, the acquisition of which must undoubtedly have been beneficial to the infant or his estate, contracts for which have been repeatedly and uniformly holden voidable, at the election of the infant.

In *Phelps v. Worcester*, 11 N. H. 51, it was holden that the services and expenses of counsel in carrying on a suit to protect the infant's title to his estate, could not be regarded as necessities, and that the infant's liability for them might be avoided, even under an express promise to pay for them. Upham, J., in pronouncing the opinion of the court, remarked — "The inquiry has been made, if there had been no guardian, and the infant were without aid, whether he might not employ others to protect his rights to his property, and be legally holden, notwithstanding the interposition of his minority. We think clearly not. Though such services may promote the sound interests of the ward [infant ?] they are not such assistance as comes within the term necessities. Lord Coke considers the necessities of the infant to include victuals, clothing, medical aid, and good teaching or instruction, whereby he may profit afterwards. Coke Lit, 172 a. Such aid concerns the person and not the estate, and we know of no authority which goes beyond this."

Now if the services and expenses of counsel in protecting the property of an infant are not necessities, on what principle can it be contended that the insurance of that property against loss by fire can be? The object is the same in both cases — the protection and security of the infant's property; and instances can readily be conceived where the services of learned and experienced counsel might be quite as valuable and important as any contract of insurance. The test of beneficiality, then, cannot be relied on as determining whether or not a thing is to be reckoned among necessities.

But it seems to us the suggestion in the case last cited, that necessities concern the person and not the estate, furnishes the true test on this subject. Although there may be isolated cases where a contrary doctrine has obtained, we apprehend the true rule to be, that those things, and those only, are properly to be deemed necessities, which pertain to the becoming and suitable maintenance, support, clothing, health, education and appearance of the infant,

according to his condition and rank in life, the employment or pursuit in which he is engaged, and the circumstances under which he may be placed as to profession or position. *Coke Lit.* 172 a; *Whittingham v. Hill*, *Cro. Jac.* 494; *Ive v. Chester*, *Cro. Jac.* 560.

If this be so, then matters which pertain only to the preservation, protection, or security of the infant's property, are excluded from the list of necessities, however beneficial. Whatever relates to his property is the legitimate business of a guardian, and if transacted by the infant may be avoided at his election.

Such are our convictions of the proper limit of the validity of the contracts of infants. Any other limitation would, it seems to us, lead to an almost interminable variety of decisions on this subject, and tend to destroy those safeguards which the wisdom of the law has established to protect the inexperience and credulity of youth against the wiles and machinations of designing men. We are satisfied that the principle of the adjudged cases does not require, nor would sound policy justify our holding, that a contract, made by a minor for the protection or preservation of his property by insurance against fire, is a contract for necessities, within the legal acceptance of that term, however judicious or beneficial such contract might ordinarily be regarded.

Had we arrived at a different conclusion on the last point, the question might have arisen, whether this action could be maintained on the present declaration, the only count in the writ, so far as appears, being upon the note, which is avoided by the plea of infancy, the same not having been ratified by the defendant after he became of age. The result to which we have come, however, renders it unnecessary to enter upon this inquiry.

According to the provisions of the agreed case, there must be judgment for the defendant.<sup>1</sup>

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### JORDAN v. COFFIELD AND WIFE.

70 N. C. 110.—1874.

SETTLE, J. The plaintiff, who is a merchant, furnished to the *feme* defendant certain articles, just previous to her marriage, consisting of a chamber set and other articles, constituting her bridal outfit, amounting in all to the value of \$104.25. It is conceded that the chamber set is still in the possession and use of the defendants.

To the plea of infancy, the plaintiff replies, necessities.

The evidence in regard to the estate and degree of the *feme* defendant is set forth in the record.

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<sup>1</sup> See, also, *Barker v. Hibbard*, 54 N. H. 539; *Crafts v. Carr*, 24 R. I. 397.



His honor charged that if the jury believed the articles furnished were actually necessary, and of a reasonable price, the plaintiff was entitled to recover. The record simply states that the defendant excepted. But we see no objection to this charge.

In *Smith v. Young*, 2 Dev. & Bat. 26, Daniel, J., states the rule governing such cases with great clearness. He says: "The question whether necessities or not, is a mixed question of law and fact, and as such should be submitted by the judge to the jury, together with his directions upon the law; whether articles furnished to an infant are of the classes for which he is liable, is matter of law; whether they are actually necessary and of reasonable price, is matter of fact for the jury."

In addition to the authorities cited by the learned judge in support of this proposition we would add the recent case of *Ryder v. Wombwell*, decided in the Court of Exchequer, and reported in Law Reports of 1868-9, page 31.

His honor is to be understood as holding the articles furnished to be of the class for which the defendant would be liable, and it appears from the record that there was evidence, which was well left to the jury, and from which they might have properly found that the articles were necessary to one in the degree and condition of the defendant, and that they were of reasonable price. There is an exception to the general rule, that an infant is incapable of binding himself by a contract made, not in favor of tradesmen, but for the benefit of the infant himself, in order that he may obtain necessities on credit. As is well said in *Hyman v. Cain*, 3 Jones, 111, "infants had better be held liable to pay for necessary food, clothing, etc., than for the want of credit, to be left to starve."

Nor are we to understand by the word necessities only such articles as are absolutely necessary to support life, but it includes also such articles as are suitable to the state, station and degree in life of the person to whom they are furnished. *Peters v. Fleming*, 6 M. & W. 46.

Although the point is not distinctly made, upon the record, yet it would seem that the defendant relies somewhat upon the idea that her mother was bound to support her, notwithstanding the fact that she had some estate of her own. The obligation of the mother is not the same as that of the father to support infant children, and the weight of authority, both in this country and in England, is against the liability of the mother to this burden, except under peculiar circumstances. 1 Parsons on Con. (5th ed.), p. 308.

Let it be certified that there is no error.

Judgment affirmed.

## 5. EXECUTORY CONTRACT FOR NECESSARIES.

GREGORY *v.* LEE.

64 CONN. 407.—1894.

TORRANCE, J. The complaint in this case alleges that on the first of June, 1892, the defendant, being a student at Yale College, entered into a contract with the plaintiff by which he leased a room for the ensuing college year of forty weeks, at an agreed rate of \$10 per week, payable weekly, and immediately entered into possession of said room, and has neglected and refused to pay the rent of said room for ten weeks ending February 7th, 1893.

The answer in substance is as follows:

On or about September 15th, 1892, the defendant agreed to lease a room in the house of the plaintiff for the ensuing college year of forty weeks, at the agreed rate of \$10 per week, payable weekly; that he then entered into possession of said room and occupied it till December 20th, 1892; that on said day he gave up possession of said room and ceased to occupy the same, and then paid to the plaintiff all he owed her for such occupation and possession up to that time; that immediately thereafter he engaged at a reasonable price another suitable room elsewhere, and continued to possess and occupy the same till the end of said college year; that during all of said period he was a minor and a student in said college; that on December 20th, 1892, he refused to fulfill said agreement with the plaintiff to occupy or pay for said room for the remainder of said forty weeks, and has always refused to pay for the time during which he did not possess or occupy said room.

The reply to the answer was as follows:

“Par. 1. Plaintiff admits all the allegations of said defence.

“Par. 2. Defendant at the time of making said contract was between nineteen and twenty years of age.

“Par. 3. Defendant and his parents are residents of the Island of Trinidad. His father makes him an annual allowance out of which he is expected to defray all his college expenses, including room and board, transacting the business incidental thereto in his own name and not on account of his father.

“Par. 4. It is the general custom among students and lodging-house keepers to rent rooms for the college year of forty weeks, and students also usually contract for and pay tuition by the year. Defendant, at the time of renting said rooms, had contracted for his tuition during the college year.

" Par. 5. The rent charged for the room was fair and reasonable, and was suitable to his necessities as a student and to his condition in life. It was also necessary for him to have a room as a place of lodging and study during his college year.

" Par. 6. Defendant could not have obtained a room equally suitable for his purpose nor on such advantageous terms if he had not contracted for the year, except by going to a hotel and paying the usual charges made by hotels for such period as he wished to stay. The cost of this would have been considerably greater.

" Par. 7. Owing to the custom above noted, plaintiff cannot rent her room for the balance of the year and will be subjected to great loss, unless defendant is compelled to pay rent for the balance of said period."

There was also filed in the case a second defence and a reply to the same, which, in view of the conclusion reached upon the first defence and reply thereto, need not be considered.

To the reply above set out the defendant demurred specially, the court below sustained the demurrer, and judgment was rendered for the defendant. The sole reason of appeal is the claimed error of the court in sustaining the demurrer.

Upon this appeal the facts stated in the answer, and also in the reply, so far as the same are well pleaded, must be taken to be true.

It thus appears that the defendant, a minor, agreed to hire the plaintiff's room for forty weeks at \$10 per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room and refused to fulfil said agreement on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere.

Under the facts stated, it must be conceded that this room, at the time the defendant hired it and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary; for lodging comes clearly within the class of necessities, and the room in question was a suitable and proper one, and during the period he occupied it, was his only lodging room. " Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt." *Chapple v. Cooper*, 13 M. & W. 252; 1 Swift's Digest, 52.

So long, then, as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but as he paid the agreed

price for the time he actually occupied it, no question arises upon that part of the transaction between these parties.

The question now is whether he is bound to pay for the room after December 20th, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of the transaction of a *quasi* contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. *Hyman v. Kain*, 3 Jones' L. (N. C.) 111. And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessities. *Earl v. Reed*, 10 Met. 387; *Barnes v. Barnes*, 50 Conn. 572; *Trainer v. Trumbull*, 141 Mass. 527; Keener's *Quasi Contracts*, p. 20. This being so, no binding obligation to pay for necessities can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessities. For the purposes of the case, perhaps we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it as what, on the whole, it appears the parties intended it to be, a parol lease under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defence of infancy is a good defence; for in that case the suit is upon an executory contract to pay for necessities which the defendant refused to take, and never has had, and which, therefore, he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of the defendant to pay rent weekly, we think infancy is equally a defence.

As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. *Riley v. Mallory*, 33 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. \* \* \* As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and



thus avoid his obligation." Taylor's Landlord and Tenant, sec. 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner.

The plea of infancy then, under the circumstances, must prevail, unless the matters set up in the reply make the facts set up in the answer unavailable in this case. Upon this point, without dwelling in detail upon the matters set up in the different paragraphs of the reply, we deem it sufficient to say that neither singly nor combined do the matters so set up constitute a sufficient reply to the answer.

There is no error.

In this opinion the other judges concurred.

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#### 6. LIABILITY FOR MONEY LOANED FOR NECESSARIES.

#### SWIFT AND OTHERS *v.* BENNETT.

10 CUSH. (MASS.) 436.—1852.

ASSUMPSIT on an account annexed, and on the money counts.

In addition to the general issue, the defendant pleaded infancy. At the trial in the Court of Common Pleas, the plaintiffs offered evidence that Jireh Swift, Jr., and four other persons, were owners, and Swift & Allen were agents, of the ship *Tacitus*; that in the summer of the year 1844, the defendant contracted to go on a whaling voyage in said ship, in the capacity of boat steerer; that O. H. P. Brown & Co. furnished the defendant with the usual and necessary outfit of clothing for such a voyage, and received therefor the following order: "New Bedford, June 25, 1844. Agent and owners of the ship *Tacitus*. Six months from date, for value received, pay O. H. P. Brown & Co., or order, \$75, and charge the same to account. Daniel Bennett."

This order was presented, and paid by the plaintiffs at its maturity, to O. H. P. Brown & Co.

On the part of the defendant, it was proved that at the time he was furnished with his outfit, and the date of the order and its payment, he was an infant. The plaintiffs claimed to recover on the ground that the articles furnished were necessities. The defendant's counsel objected to the introduction, by the plaintiffs, of the books of account of O. H. P. Brown & Co., and to the testimony of William H. Wrightington, one of the firm of O. H. P. Brown & Co., which were offered for the purpose of proving that necessary articles of clothing were furnished to the defendant, and paid for by the plaintiffs at his request, and contended that such evidence was

inadmissible to maintain the money counts in the writ. But the judge overruled the objection, and admitted the evidence. The defendant also contended that an infant, living with his mother, if the father was dead, could not bind himself even by a contract for necessities. But the judge instructed the jury that if the goods furnished by O. H. P. Brown & Co. were necessary clothing for the defendant on his intended voyage, and that the defendant gave an order on the plaintiffs in payment therefor, which order was subsequently accepted and paid by the plaintiffs, the plaintiffs could maintain their action on the count for money laid out and expended by them at the defendant's request for necessities furnished to him.

The jury returned a verdict for the plaintiffs. And to the foregoing rulings the defendant excepted.

BIGELOW, J. The first objection relied on by the defendant is, that he is not liable in this action because, at the time the articles in question were furnished to him he had his home with his mother, who made suitable provision for his maintenance. But we think this question is not open upon this bill of exceptions. One of the important elements which always enters into an inquiry as to an infant's liability for necessities is, whether he had a parent or guardian able and willing to support him. If he had, then there can have been no necessity for the supplies furnished him, and his responsibility therefor must fail. But this is always a question of fact, and in the present case it was properly submitted to the jury, under the instruction from the court which required them to find whether the articles furnished were necessary clothing for the defendant. This involved the inquiry of the mother's ability and willingness to support her son. The defendant is, therefore, concluded on this point by the verdict of the jury.

The next objection urged by the defendant proceeds on a misconception of the ground of the plaintiff's action. The suit is not brought upon the order or draft of the defendant, which was accepted and paid by the plaintiffs. They do not seek to charge him as drawer of this order. The action is brought to recover money paid, laid out, and expended by the plaintiffs at the defendant's request, for necessities furnished to him. The order is introduced only as evidence of the request and of the amount furnished and paid for by the plaintiffs. The gist of the defendant's liability in this action is the payment of money, by the plaintiffs, at his request, for necessities. We suppose the rule to be well settled that an infant is liable to an action at the suit of a person advancing money to a third party to pay for necessities furnished to the infant, but that he is not liable for money supplied to him, to be by him expended, although

it may actually be laid out for necessities. The reason for this distinction is, that in the latter case the contract arises upon the lending, and that the law will not support contracts which are to depend for their validity upon a subsequent contingency. 20 Amer. Jur. 281, 283; Macpherson on Inf. 506; *Ellis v. Ellis*, 5 Mod. 368; *Earle v. Peale*, 1 Salk. 387; 10 Mod. 67; *Rearsley & Cuffer's Case*, Godb. 219. So, too, it has been held that if one who is surety on a note given by an infant for necessities, pays the money, the infant is liable to him in an action for reimbursement. *Conn v. Coburn*, 7 N. H. 368. The present case seems very clearly to fall within the principle recognized and established in these decisions, by which an infant is held liable for money advanced to pay for necessities furnished to him. The transaction between the parties was equivalent to an advancement by the plaintiffs to Brown & Co., to pay for the articles furnished by them to the defendant. The goods were, in fact, not sold by Brown & Co. to the defendant, on his credit, but they were delivered to him on the credit of the plaintiffs. Brown & Co. were, in a certain sense, the agents of the plaintiffs in supplying the defendant with the goods. The dealing between the parties was tantamount to an agreement between them, that Brown & Co. should furnish necessities to the defendant for which the plaintiffs were to pay. It does not, therefore, come within the rule that money lent to an infant, to be expended by him in the purchase of necessities, cannot be recovered. It is the payment, by the plaintiffs, of money to a third person, for necessities supplied to the defendant, for which an action may well be maintained against him.

The objection to the testimony of Wrightington, one of the firm of Brown & Co., and to the introduction of the books of the firm in evidence, cannot be supported. It being necessary for the plaintiffs to show the character of the articles furnished by the defendant, his evidence was original and competent proof thereof. 1 Greenl. Ev. secs. 115, 116; *Earle v. Reed*, 10 Met. 387, 391; *Rindge v. Breck*, ante, 43.

Exceptions overruled.<sup>1</sup>

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#### 7. LIABILITY UPON PROMISSORY NOTE GIVEN FOR NECESSARIES.

### SWASEY v. THE ADMINISTRATOR OF VANDERHEYDEN.

10 JOHNS. (N. Y.) 33. — 1813.

THIS was an action of assumpsit, brought on the following note, given by the intestate, in his lifetime. "February 18th, 1810, for

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<sup>1</sup> The infant is liable for money paid at his request to satisfy a debt which he has contracted for necessities. *Randall v. Sweet*, 1 Den. 460.

value received for boarding, I promise to pay Ralph Day, or bearer, one hundred and fifteen dollars by the first day of June next." The defendant pleaded the general issue, and the infancy of the maker of the note. The plaintiff replied, that the note was given to the payee, for necessary boarding, lodging and washing, furnished by him to the intestate, in his lifetime.

At the trial it was proved that the intestate was an infant when he gave the note. It was contended by the plaintiff's counsel, that the note having been negotiated and transferred to the plaintiff, the consideration could not be inquired into, or impeached on the ground of infancy.

*Per Curiam.* A negotiable note given by an infant, even for necessities, is void. This we consider to be the law, and it is the opinion of respectable writers. Chitty on Bills, 20; 1 Campb. N. P. 553, note. The reason given is, that if the note be valid, in the first instance, as a negotiable note, the consideration cannot be inquired into when it is in the hands of a *bona fide* holder, and the infant would thereby be precluded from questioning the consideration. For the same reasons it has been held (1 Term Rep. 40), that an infant cannot state an account, as that would preclude him from investigating the items. It has also been held (1 Campb. N. P. 552), that he cannot accept a bill of exchange for necessities. Under the general issue, the defendant is accordingly entitled to judgment; and the plaintiff would even have failed on the other ground taken at the trial, for only part of the note was for necessities.

Judgment for the defendant.

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### BRADLEY v. PRATT.

23 VT. 378.—1851.

ASSUMPSIT upon a promissory note, dated October 5, 1846, and made payable to the plaintiff, or order, on demand. Pleas, the general issue, and infancy. Replication to the plea of infancy, that the note was given for necessities; and issue was joined.

From the evidence in the case the court found the following facts: The defendant, during his minority, boarded with Legrand Bradley twenty weeks, at the price of two dollars and fifty cents per week, amounting in all to the sum of \$50.00; and the price charged for the board was a reasonable price. Legrand Bradley was indebted to the plaintiff, and for the convenience of the parties he drew an order on



the defendant, authorizing him to pay the amount of the board to the plaintiff, which order the plaintiff received, and the defendant agreed to pay it. Soon after this, by consent of the parties, the order was surrendered, and the defendant gave to the plaintiff, at the request of Legrand Bradley, the note declared upon. The note was given for the exact amount of the board; and the board of the defendant was the sole consideration of the note. The defendant, at the time of the execution of the note, was a minor. The note was negotiable, but was never negotiated.

Upon these facts the County Court rendered judgment for the plaintiff for the amount of the note, principal and interest. Exceptions for defendant.

REDFIELD, J. \* \* \* 3. In regard to the general question of the defendant's liability, we do not think it easy to reconcile all the cases to any one rule. It was once held, as clear law, that an infant was not liable upon a promissory note given for necessities, or upon an account stated. *Trueman v. Hurst*, 1 T. R. 40, decides that an action upon an account stated will not lie against an infant, even for necessities; and the reporter understands this same case as virtually holding that the infant is liable on his promissory note for necessities (see the index), which it seems to me makes the decision inconsistent with itself. For what is a promissory note, between the original parties, but an account stated? I should understand this same case as deciding that the action will lie upon neither a promissory note, nor an account stated, and that the party finally went upon the common counts in his declaration. *Swasey v. Vanderheyden*, 10 Johns. 33, expressly decides this. The great weight of authority goes in favor of this proposition, not only the elementary writers, but very many adjudged cases. But see 2 Dane's Abr., *infra*.

But Judge Story in his treatise on Promissory Notes, after stating this in general terms, raises a query in a note, how far this holds in regard to necessities. And by referring to the books, which he cites, it is evident he considered the question an open one. In Com. Dig. Tit. Inf. B. 5, it is laid down, *totidem verbis*, that an infant is liable upon a single bill, or an *insimul computassent*—which is, in my judgment, equivalent to saying, that he is liable upon a promissory note. In 2 Dane's Abr. 365, it is said, the infant is liable upon a security for necessities, the consideration of which may be inquired into:—hence by a note before negotiated, or after dishonored, or not negotiable,—citing Cro. Jac. 106; B. N. P. 126; 1 D. & E. 40, *supra*. The same rule is recognized in *Stone v. Dennison*, 13 Pick. 1, and expressly decided, upon great consideration, in *Earle v. Reed*, 10 Met. 387.

We may then, we think, regard the question as still *in dubio*, and justifying the court in treating it as still an open question. And being so, we should desire to put it upon safe and consistent ground. We are led, then, to inquire, what is the true principle lying at the foundation of all these inquiries.

We think it is, that the infant should be enabled to pledge his credit for necessities to any extent, consistent with his perfect safety. All the cases and all the elementary writers expressly hold that it is for the benefit of the infant, that he should be able to contract for necessities; and we see no reason, why he may not be allowed to contract in the ordinary modes of contracting, so far as his perfect safety is maintained always. He must of necessity make many express contracts in regard to necessities, where he provides for himself. He must designate the kind of supply, the quantity, and will of necessity stipulate, generally, as to the price and mode of payment, and his admissions and declarations may always be shown, as well in regard to contracts, as torts, I take it. It was certainly so held, many years since, in the county of Bennington, by this court, *ut audiui*. If, then, these admissions and stipulations are to go in as evidence before the triers of facts, although not in any sense conclusive, I do not well comprehend why, upon principles, any express contract may not be said to be binding upon him, when it is shown to have been given for necessities and the price to have been reasonable, if it be one where the consideration may be inquired into. Comyn says, *ubi supra*, "so a contract to pay so much per annum for his diet and schooling is good,"—citing 1 Roll. 729 b. 35. And if so, why not upon a promissory note, or account stated? I see no good reason.

And if it were not for maintaining the unimpeachable character of negotiable paper, in regard to consideration, so that all might safely take it, I do not see why the rights of infants, in regard to acceptances and notes negotiated, might not be saved by allowing them, as an exception to the general rule, to show their infancy, and then for the plaintiff to meet it by proving the contract to have been given for necessities. But this has not been done, and probably could not be done, without too great an infringement of the rules of law in regard to negotiable paper, while current. And as confessedly the infant may *prima facie* avoid his note, or bill, by merely showing the fact of his infancy at the time of making the contract, what is the impropriety in allowing the plaintiff to recover in all such cases, by showing the consideration to be for necessities.

But so long as the contract remains in a form to be open to all defences, we see no reason whatever why the party should be driven

out of court upon mere form. The case of *Conn v. Coburn*, 7 N. H. 368, where it was held that an infant was liable to one who signed a note with him, as surety, given for necessities, who had paid the money, goes to that extent, we think. Here the plaintiff has, at the defendant's request, paid Legrand Bradley for necessities for the defendant and agreed to look solely to the defendant. And if in such a case, the law implies a promise on the part of the infant to indemnify his surety, and the cause of action arises, when the surety pays the money, how does the case differ from the present, except that the defendant has executed a promissory note to his surety? Upon the view taken of this case in the County Court, it seems to us identical with that of *Conn v. Coburn*. We see no good reason to distinguish between this case and that of a promissory note given to the party providing the necessities. It is equally open to examination as to the consideration.

The chief reason, perhaps, why an infant is not liable at law, and is liable in equity, for money borrowed, and which is actually expended for necessities, is the want of privity between the lender and the one who furnishes the necessities. If one buys necessities for an infant with money, or if, at the request of the infant, he pay for those already furnished, the infant is liable, I apprehend. That privity is here established. It is difficult to perceive, why, if an infant is liable on a single bill, which is a bond without penalty, given for necessities, he should not be equally so on a promissory note, or an account stated. \* \* \*

Judgment affirmed.<sup>1</sup>

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<sup>1</sup> "The views of this subject which strike us as the most reasonable may be stated as follows: If the payee of a note made by an infant were to sue him upon it as maker, and he pleaded infancy, the payee might reply that it was executed for necessities, and that such necessities were reasonably worth the amount specified in the note. The burden of proof would rest upon the plaintiff to show that the consideration was necessities, and also to show their value; and no more than the value proved could be recovered. And this view would apply whether the note were in form negotiable or not. If the indorsee of the payee of such a note were to sue the indorser, the latter would, of course, be bound to him whether the maker were an infant or not, for by indorsement he warrants the capacity of prior parties and the entire validity of the paper. And were the indorsee to sue the maker, and he were to plead infancy, there seems to be no good reason why it might not be replied that the note was given for necessities, and that they were worth the amount specified; and that the indorsee, like the payee, should be entitled to recover upon proving the consideration to have been necessities, and upon showing their value. The distinction taken in some cases, that the payee may sue the infant as maker, but that an indorsee cannot do so, seems extremely technical and unreasonable. If not absolutely void as to the payee, we cannot perceive why it should be so held

## *Torts by Infants.*

### I. IN GENERAL.

#### HUCHTING *v.* ENGEL.

17 WIS. 230.—1863.

HUCHTING brought an action before a justice of the peace against Moritz Engel, for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The plaintiff proved the alleged trespass and damages; and on the part of the defence it was shown that the defendant, at the time of the trespass, was but little more than six years old. A motion to dismiss the action on the ground that the defendant was "of such tender years that a suit at law could not be maintained against him," was overruled.

The justice rendered judgment against the defendant for \$3.00 damages, with costs. The Circuit Court, on appeal, reversed the judgment; and the plaintiff sued out his writ of error.

DIXON, C. J. "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action

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as to an indorsee, who, while he could not stand upon a better footing than the indorser as against the infant, certainly should not be placed upon a worse; for the payee must generally have a better opportunity to know the fact of infancy than he. Nor can we see that holding the original consideration to be open to proof, upon infancy being shown, would damage the character of a negotiable note more than declaring it utterly void.

Justice seems to require that the mere negotiable form of the paper should not destroy all validity; and although it could not be said to be negotiable in the full sense of that term—protection to the infant—which is the sole object of the law—requires no more than that his infancy should shield him from all liability beyond the actual value of the necessities furnished, and justice to the holder demands that at least that should be given him. The Scotch law is entirely in harmony with these views." — DANIEL, *Negotiable Instruments*, § 226, 4th ed. (1891), with authorities there cited.



grounded on fraud committed." Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature; as disseizins, trespass, slander, assault, etc." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." *Hartfield v. Roper*, 21 Wend. 620.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. *Fennings v. Rundall*, 8 Term. 335; *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Campbell v. Stakes*, 2 Wend. 137; *Bullock v. Babcock*, 3 Wend. 391; *Neal v. Gillett*, 23 Conn. 437; *Humphrey v. Douglass*, 10 Vt. 71. In the latter case the minor was held answerable for a trespass committed by him, although he acted by command of his father.

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants; to the question of negligence on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskilfulness of others; and to the liability of parents and guardians for wrongs committed by infants under their charge, by reason of the neglect or want of proper care of such parents or guardians. The case at bar is none of these. The defendant is not prosecuted criminally, the action is not by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents, and another; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him; not vindictive or punitive damages, but compensation; and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.<sup>1</sup>

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<sup>1</sup> A boy twelve years old was held responsible for battery in *Vosburg v. Putney*, 80 Wis. 523; a boy thirteen years old was held responsible for negligence in *Neal v. Gillett*, 23 Conn. 437.

## 2. WHEN CONNECTED WITH CONTRACT.

EATON *v.* HILL.

50 N. H. 235—1870.

CASE, by Eaton & Whittemore against Charles E. Hill and Dana Cummings.

BELLOWS, C. J. The substance of the declaration is, that the defendant having hired the plaintiff's horse for a short journey, drove him so carelessly and immoderately as to cause his death. No promise is alleged to drive him moderately and with due care, but the plaintiffs put their case upon the ground of a breach of duty by the defendant, and the doing of a tortious act; and the question is, whether a minor is liable in such case.

On this point the authorities are not altogether harmonious. In *Fitts v. Hall*, 9 N. H. 441, the cases were examined, and this principle deduced from them in the opinion by Parker, C. J., that "if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable." In that case it was decided that an infant was liable for deceit in falsely representing himself to be of age, and thereby inducing the plaintiff to sell him goods on credit, and afterwards avoiding his promise to pay by pleading infancy. The general doctrine of *Fitts v. Hall* is fully approved in *Prescott v. Norris*, 32 N. H. 103, per Perley, C. J., and is supported by the reasoning of the court in *Woodman v. Hubbard*, 25 N. H. 67, 73. Indeed, it would seem to be too clear to admit of controversy, that an infant bailee must be liable for the injury or destruction of the thing bailed, by his positive, willful, and tortious act, even although it was part of the contract, express or implied, that the goods should be safely returned. As if, in the case of the bailment of a horse, he willfully beat him to death, or willfully drove him so immoderately as to endanger his life, and knowing that he did so, and actually causing his death. Such acts, indeed, would be wholly unauthorized by the contract of bailment; and in respect to them the infant would stand as if no such contract existed. So that an action of trover might be maintained against him on the ground that the bailment was thereby determined.

*Wentworth v. McDuffee*, 48 N. H. 402. It does not follow from this that for every case of immoderate driving for which an adult would be liable, an infant bailee would also be liable. The bailee in these cases is understood to stipulate for ordinary care and skill in the use of an animal so bailed, and for any injury caused by the want of it, he is liable. In the case of the infant, however, his promise to use due care and skill does not bind him, but he is still liable for positive tortious acts, willfully committed, whereby the thing bailed is injured or destroyed. If through want of skill and experience, the animal is unintentionally injured by the infant, it might well be contended that he would not be liable because he has made no binding promise to exercise such skill. There are cases which hold that an infant, who hires a horse for a journey, is not liable for an injury caused by immoderate driving. The case of *Fennings v. Rundall*, 8 T. R. 335, is of this character, and the court held that the cause of action arose out of a contract, and that the infant could not be made liable by changing the form of action to tort. This case is criticised and doubted by Parker, C. J., in *Fitts v. Hall*, upon the ground that Lord Kenyon seemed to regard the injury as resulting from an accident, without adverting to that part of the declaration which might, with proper proof, have made a case of conversion. It is very true that Lord Kenyon, in his opinion, assumes that the injury to the horse was accidental, although the declaration alleges that the defendant wrongfully drove the mare immoderately, and so caused the injury. The other judges also assume that the cause of action was substantially a breach of contract; and if this were so, the decision was clearly right, and would not conflict with the doctrine of *Fitts v. Hall*.

There are other authorities that accord with *Fennings v. Rundall*. See 1 Am. Lead. Cas. (4th ed.), 261-263, and cases cited. In *Schenk v. Strong*, 1 Southard, 87, infancy was held to be a good bar to an action on the case alleging that a chair was lent to defendant for a particular journey, to be used carefully and returned at a specified time, yet that he went on a different journey, carelessly broke it, and did not return it at the time agreed, thereby violating his engagement in every particular. In all respects except the going a different journey, this has the character of a mere breach of contract, for which the infant cannot be made liable by changing the form of the action. The using the chair for a different journey was not a mere breach of contract, but a positive tortious act for which the infant was liable in some proper form of action. *Homer v. Thwing*, 3 Pick. 492; *Towne and al. v. Wiley*, 23 Vt. 353. In such cases the infant stands like an adult, and is liable on the ground

that using the thing bailed for another purpose is a conversion. In such case an adult is clearly liable, *Woodman v. Hubbard*, 25 N. H. 72, where it was held by Perley, J., that driving a horse to a place beyond the limits for which he was hired was a wrongful invasion of the plaintiff's right of property, and not a mere breach of contract; and the case, *Homer v. Thwing*, is cited and approved. The judge says that this case and *Vasse v. Smith*, 6 Cranch, 231; *Campbell v. Stakes*, 2 Wend. 137, and *Mills v. Graham*, 1 Bos. and P. New, 140, are strong authorities to the point that an infant who receives goods on a contract, and disposes of the property without right, is liable in trover.

In *Mills v. Graham*, 1 B. and P. New, 140, it was held that an infant who has received of the plaintiff skins to be dressed and returned, was liable in trover for refusing to return them on demand. In *Parsons on Con.* 264, it is laid down that for a tort or fraud which is a mere breach of his contract, an infant is not liable; but where the tort, though connected by circumstances with the contract, is still distinguishable from it, there he is liable,—as, if he hires a horse for an unnecessary ride, he is not liable for the hire; but if, in the course of the ride, he willfully abuses and injures the horse, he is liable for the tort; and if he should sell the horse, trover would lie. In 2 Greenl. Ev. sec. 368, it is laid down, that an infant bailee of a horse is not liable for treating him negligently or riding him immoderately, but is liable if he goes to a different place, or beats the animal to death. In *Campbell v. Stakes*, 2 Wend. 37, it was held that if an infant who has hired a horse, willfully and intentionally injures the animal, trespass will lie against him, or if he does any willful or positive act which amounts to a disaffirmance of the contract; but if he neglect to use him with ordinary care, or to return him at the time agreed on, he is not liable. This case is cited with approbation in *Fitts v. Hall*. *Campbell v. Stakes* was an action of trespass; and the court held that infancy, with an averment that the injury occurred in driving the horse through the unskillfulness and want of knowledge, discretion, and judgment of the defendant, was a good plea.

In *Towne and al. v. Wiley*, 23 Vt. 359, the doctrine is said to be that infants are held liable for positive and substantial torts, but not for violations of contracts merely, although by the rules of pleading a plaintiff might declare in tort or contract at his election; and in this case Judge Redfield endorses the doctrine of *Fitts v. Hall*.

We think, then, that the doctrine is well established, that an infant bailee of a horse is liable for any positive and willful tort done to the animal distinct from a mere breach of contract,—as, by driving to



a place other than the one for which he is hired, refusing to return him on demand after the time has expired, willfully beating him to death, and the like; so, if he willfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so. In *Wentworth v. McDuffie*, 48 N. H. 402, such driving by an adult was held to be a conversion; and, for aught we can see, the same principle would apply to the case of an infant.

In all these cases it may be urged that the law implies a promise, on the part of the bailee, to drive the horse only to the appointed place, to return him at the end of the journey, not to abuse him or drive him immoderately, and that a failure in either respect is merely a breach of contract. So it might be said that the law would raise a promise not to kill him; and yet no one would fail to see that to kill him willfully would be a positive act of trespass, for which an infant should be liable the same as if there were no contract.

Between acts that are to be regarded as mere breaches of the contract of bailment and positive and willful torts, a line must be drawn somewhere; and although it must often be difficult to discriminate between them, we think it is safe to hold that the acts we have named, and others of a like character, are positive torts for which an infant is liable, and not mere breaches of contract. When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails for want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his want of capacity to make and fully understand such contracts, should shield him. A failure in such a case, from mere want of ordinary care or skill, might well be regarded as, in substance, a breach of contract for which the infant is not liable, even although in ordinary cases an action *ex delicto* might be sustained. But when, on the other hand, the infant wholly departs from his character of bailee, and by some positive act willfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there had been no bailment, even if assumpsit might be maintained in the case of an adult, or a promise to return the thing safely.<sup>1</sup>

In the case before us, the declaration embraces a charge of immoderate driving whereby the plaintiff's horse was killed, and, as we have seen, the proof might be such, under a proper declaration, as to charge the infant; and it might be such as to show that the immoderate driving was unintentional and wholly owing to want of experience and discretion, in which case he would not be liable. The question then is, whether an action on the case, as this is, can

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<sup>1</sup> Accord, *Churchill v. White*, 58 Neb. 22.

be maintained for any cause of action that may be proved under this declaration. If it can be, the demurrer must be sustained.

In some cases it is held that by a positive and willful tort the bailment is determined, and the remedy must be by action of trespass or trover, and that case will not lie. Such is the doctrine of *Campbell v. Stakes*, before cited; and the court put it upon the ground that the action on the case necessarily supposes the defendant to have a right to the possession of the property, under the contract of hiring, at the time the injury was committed, and that by declaring in case the plaintiff affirms the existence of such contract, and the plea of infancy would be a good defence to such action — citing *Jennings v. Rundall*, 8 T. R. 335, and *Green v. Greenbank*, 2 Marshall, 485, 4 Eng. Com. Law, 375.

To the correctness of this view we are unable to subscribe. If a wrong has been done to the property bailed of such a nature that an action on the case would ordinarily be an appropriate remedy, and at the same time an infant would be liable for it in any form of action, we perceive no reason for holding that case would not lie against him.

If the declaration sets out a cause of action which is good against an infant bailee, by reason of its being a positive and willful wrong and not a mere breach of contract, and at the same time, according to the rules of pleading, an action on the case appears to be the appropriate remedy, we think it clear that such an action would be maintained.

If it were necessary that the bailment should be determined in order to maintain the action, the facts stated would show it the same as it would be shown by stating a conversion in trover.

In many cases trespass or trover will lie for injuries done by bailees, and to maintain those suits the bailment must have been determined; and this is shown by proof of tortious acts inconsistent with the bailment — and from the bringing of these suits it may fairly be inferred that the plaintiff elects to consider the bailment at an end. In bringing an action on the case, setting out such a positive and willful tort as is wholly inconsistent with the contract of bailment, and amounts to a disaffirmance of it, the same inference may be made. In all these cases the actions are based upon acts which disaffirm the contract of bailment, and the bringing the suits is an election by the bailor to consider the bailment terminated; and this applies to an action on the case for a tort which disaffirms the contract, the same as to trespass or trover; the latter is, indeed, but a subdivision of actions upon the case.

We are brought, then, to the conclusion, that case will lie against

an infant bailee for a positive and willful tort of such a nature that, upon general principles of pleading, case is a proper remedy.

Whether such a cause of action exists here remains to be seen. The declaration does not state such a cause. It states a bailment of the horse to defendant, and that he drove him so carelessly and immoderately as to cause his death. This, we think, does not go far enough to charge an infant bailee. It, indeed, goes no further than to charge him with what is in substance a breach of contract, and to that the plea of infancy is a good defence. In this respect it comes within the principle of *Fennings v. Rundall*, 8 T. R. 335, before cited. It is true that the immoderate driving may have been a positive and willful act so as to make the infant liable; but we think that unless it is so stated, the plea of infancy is a good defence.

If the acts will justify it, the plaintiffs may have leave to amend their declaration upon terms which will be the costs of demurrer. Whether the facts will justify such an amendment of the count in case as will support it, remains to be seen. That a count in case might, under some circumstances, be the appropriate remedy may be inferred from the case of *Gilson v. Fisk*, 8 N. H. 404, and the cases cited, as well as the case of *Waterman v. Hall*, 17 Vt. 128, and numerous cases where it is held that a party may, at his election, sue in trespass, or waive the trespass and sue in case.

Under some circumstances trover would lie as we have seen, and as case and trover may be joined, there would seem to be no objection to adding a count in trover by way of amendment if the identity of the cause of action would be preserved.

As it now stands, the conclusion is, the demurrer must be overruled.<sup>1</sup>

### RICE v. BOYER.

108 IND. 472.—1886.

ELLIOTT, C. J. It is alleged in the complaint of the appellant, that the appellee, with intent to defraud the appellant, falsely and fraudulently represented that he was twenty-one years of age; that, relying on this representation, the appellant was induced to sell and deliver to the appellee, on one years' credit, a buggy and a set of harness; that the appellee, in payment for the property, delivered to appellant a buggy, and executed to him promissory note, payable one year after date, and also executed a chattel mortgage to secure the

<sup>1</sup> *Contra*, *Penrose v. Curren*, 3 Rawle (Pa.), 351. In *Lowery v. Cate*, 108 Tenn. 54, an infant performing a contract of threshing was not held liable for negligently setting fire to the barn of the other party.

payment of the note; that the appellee's representation was untrue; that he had not attained the age of twenty-one years; that on account of appellee's non-age the note cannot be enforced; that the appellee avoided his note and mortgage by a sale of the mortgaged property, "and repudiates and refuses to be bound by his contract in reference thereto;" that the appellant brings into court the note and mortgage executed to him, and tenders them to the appellee. Prayer for judgment for the value of the property delivered to appellee.

To this complaint a demurrer was sustained, and error is assigned on that ruling. \* \* \*

The material and controlling question in the case is this: Will an action to recover the actual loss sustained by a plaintiff lie against an infant who has obtained property on the faith of a false and fraudulent representation that he is of full age?

Infants are in many cases liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge Cooley says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it as a tort." Cooley Torts, 106. In another place the same author says: "So, if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley Torts, 107. Addison, following the English cases, says: An infant is not liable "if the cause of action is grounded on matter of contract with the infant, and constitutes a breach of contract as well as a tort." Addison, Torts, sec. 1314.

Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. *Howlett v. Haswell*, 4 Campb. 118; *Green v. Greenbank*, 2 Marsh. 485; *Vasse v. Smith*, 6 Cranch, 226 (1 Am. Lead. Cases, 237); *Studwell v. Shapter*, 54 N. Y. 249.

It is also generally held that an infant is not estopped by a false representation as to his age, but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by a representation. *Carpenter v. Carpenter*, 45 Ind. 142; *Sims v. Everhardt*, 102 U. S. 300; *Whitcomb v. Foslyn*, 51 Vt. 79 (31 Am. R. 678); *Conrad v. Lane*, 26 Minn. 389 (37 Am. R. 412); *Wieland v. Kobick*, 110 Ill. 16 (51 Am. R. 676); *Ward v. Berkshire Life Ins. Co.*, ante, p. 301.



It is evident from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. *Johnson v. Pie*, 1 Lev. 169; *Price v. Hewitt*, 8 Exch. 146; *Liverpool, etc., Ass'n v. Fairhurst*, 9 Exch. 422; *Brown v. Dunham*, 1 Root, 272; *Curtin v. Patton*, 11 Serg. & R. 305; *Homer v. Thwing*, 3 Pick. 492; *Word v. Vance*, 1 N. & McC. 197; *Fitts v. Hall*, 9 N. H. 441; *Norris v. Vance*, 3 Rich. 164; *Gilson v. Spear*, 38 Vt. 311.

Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract-price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age, is well sustained by authority, and it is strongly entrenched in principle, although, as we have said, there is a fierce conflict. It has been sanctioned by this court, although, perhaps, not in a strictly authoritative way, for it was said by Worden, J., speaking for the court, in *Carpenter v. Carpenter*, *supra*, that, "The false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. See 1 Parsons, Cont. 317; 2 Kent's Com. (12th ed.) 241."

The reasoning of the court in the case of *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151, tends strongly in the same direction.

In *Neff v. Landis*, 1 Atl. R. 177, it was said: "It cannot be doubted that a minor who, under such circumstances, obtains the property of another, by pretending to be of full age and legally responsible, when, in fact, he is not, is guilty of a fraud by false pre-

tence, for which he is answerable under the criminal law. 2 Whart. Crim. Law, 2099."

If it be true, as asserted in the case from which we have quoted, that an infant who falsely and fraudulently represents himself to be of full age is amenable to the criminal law, it must be true, that he is responsible in an action of tort to the person whom he has wronged. The earlier English cases were undoubtedly against our conclusion, but the later cases seem to take a different view of the question; thus, in *Ex parte Unity, etc., Banking Ass'n*, 3 DeG. & J. 63, it was held that, in equity, an infant who falsely and fraudulently represented himself to be of full age was bound to pay the obligation entered into on the faith of his representation.

In the note to the case of *Humphrey v. Douglass*, 33 Am. Dec. 177, Mr. Freeman says, in speaking of the decision in *Kilgore v. Jordan*, 17 Texas, 341, that, "Aside from any question of authority, the rule given, in the case last cited, by Hemphill, C. J., as the rule of the Spanish, derived from the civil law, that if a minor represents himself to be of age, and from his person he appears to be so, he will be bound by any contract made with him, seems to be most consonant with reason and justice."

Mr. Pomeroy pushes the doctrine much farther than we are required to do here, for he says: "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were adult, and may cancel a conveyance or executed contract obtained by fraud." 2 Pomeroy, Eq., sec. 945.

In addition to cases cited which sustain our view may be cited the following authorities: *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly, 334; *Schuckemann v. Paradise*, 46 How. Pr. 426; Tyler, *Infancy*, 182; 1 Parsons, *Cont.* 317, note; 1 Story *Eq.* 385.

The English cases recognize a distinction between suits of equitable cognizance and actions at law, and declare that a representation as to age, when falsely and fraudulently made, will bind an infant in equity. *Ex parte Unity, etc., Ass'n, supra*, and authorities cited. Under our system we can recognize no such distinction, a distinction which is, as we think, a shadowy one under any system, for in our system the rules of law and equity are merged and mingled. Under such a system as ours courts should pursue such a course as will render justice to suitors under the rules of equity, which, after all, are but the embodiment of the principles of natural justice. It cannot be the duty of any court of Indiana to deny substantial justice because the complaint states a cause of action in a peculiar form, for under our system courts must render such judgments as

yield justice to those who invoke their aid, irrespective of mere forms, in all cases where the substantial facts are stated, and are such as entitle the party to the general relief sought. They will not inquire whether the proceeding which asks their aid is at law or in equity, but they will render justice to those who ask it in the method prescribed by our Code of Civil Procedure.

It is laid down as a general rule by all the text-writers, that infants are liable for their torts, but many of these writers, when they come to consider such a question as we have here, are sorely perplexed by the early English decisions, and, by subtle refinement, attempt to discriminate between pure torts and torts connected with contracts, and to create an artificial class of actions. Their reasoning is not satisfactory. Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to mere personal torts. There is a connection between a contract and a tort in every case of bailment, of the bargain and sale of personal property and of the purchase and sale of real estate, and if an infant is not responsible for his fraudulent representation of his age, in connection with such transactions, there is not within the whole range of business transactions any case in which he could be made liable for his fraud. There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley, *Torts*, 112, *auth. cited in notes*. The cases certainly do agree; it is, indeed, difficult, if not impossible, to perceive how it could be otherwise, that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is, that he is liable, to the extent of the loss actually sustained, for his tort where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. Nor does such a rule open the way for a designing man to take advantage of an infant, for it holds him to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, because it allows him compensation only for the actual loss sustained. It does not permit him to make any profit

out of an executory contract, but it simply makes good his actual loss.

It is worthy of observation that in the cases which hold that an infant's representation will not estop him to deny his disability, it is generally declared that he may, nevertheless, be held liable for his tort.

It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasonable diligence, which is exacted in all cases, would warn the plaintiff of the non-age of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor, who is really twenty years and ten months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is twenty-one years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contract, but for the loss occasioned by his fraud?

The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation, and it will not open the way to imposition upon infants, for, in no event, can anything more than the actual loss sustained be recovered, and no person who trusts, where fair dealing and due diligence require him not to trust, can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for, in such a case, the action would be on the promise, and the only recovery that could be had for the breach of contract, and the terms of our rule forbid such a result, but it will apply where an infant, on the faith of his false and fraudulent representation, obtains property from another and then repudiates his contract. Any other rule would in many cases suffer a person guilty of positive fraud to escape loss, although his fraud had enabled him to secure and make way with the property of one who had trusted in good faith to his representation, and had exercised due care and diligence. We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value successfully plead his infancy. Such a rule would make the defence of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defence.

Judgment reversed with instructions to overrule the demurrer to the complaint.



SLAYTON *v.* BARRY.

175 MASS. 513. — 1900.

MORTON, J. The declaration in this case is in two counts. The first count alleges, in substance, that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff to sell and deliver to him the goods described, and, though often requested, had refused to pay for or return the goods, but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 Term R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. (N. S.) 258; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Gilson v. Spear*, 38 Vt. 310; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561; *Ferguson v. Bobo*, 54 Miss. 121; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovey*, Id. 179; *Wilt v. Welsh*, 6 Watts, 9; *Burns v. Hill*, 19 Ga. 22; *Kilgore v. Jordan*, 17 Tex. 341; Benj. Sales (6th Ed.), 23; Cooley, Torts (2d Ed.) 126; Add. Torts, § 1314. See, *contra*, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235; *Hall v. Butterfield*, 59 N. H. 354; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420; *Wallace v. Morss*, 5 Hill, 391.

The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Shaw v. Coffin*, 58 Me. 254; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well-settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in *Association v. Fairhurst*, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: if the fraud "is directly connected with the contract, \* \* \* and

is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent Com. (8th Ed.) § 241, as follows: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition, it would be better if the rule were as laid down in *Fitts v. Hall*, *supra*, and *Hall v. Butterfield*, *supra*, in New Hampshire, and *Rice v. Boyer*, *supra*, in Indiana, we need not consider. The plaintiff relies on *Homer v. Thwing*, *supra*; *Badger v. Phinney*, 15 Mass. 359; and *Walker v. Davis*, 1 Gray, 506.

In *Walker v. Davis*, *supra*, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly, as a conversion. *Badger v. Phinney*, *supra*, was an action of replevin; and it was held that the property had not passed, or if it had, that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer v. Thwing*, *supra*, the tort was only incidentally connected with the contract of hiring. We think that the exceptions should be overruled. So ordered.<sup>1</sup>

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<sup>1</sup> In *O'Rourke v. Ins. Co.*, 23 R. I. 457, an infant, in an application for life insurance, made a false statement which, by the terms of the policy, was a warranty. In an action on the policy, the defence was a breach of condition by the infant; but the court held that "as an infant is not liable on his contract, he is not liable for warranties or representations upon which the contract is based," and, there having been a verdict for plaintiff, a new trial was denied.

## STUDWELL ET AL. v. SHAPTER.

54 N. Y. 249.—1873.

LOTT, CH. C. This is an action for the recovery of the price and value of goods sold and delivered by the plaintiffs to the defendant.

There was no question made on the trial as to the fact of such sale and delivery; but it appeared that the defendant was at the time an infant, and on that ground his counsel moved for a nonsuit, and also asked the court to instruct the jury that the plaintiffs could not recover. This was refused. The court conceded that the action was founded on contract, but based his refusal on the ground that the statements in reference to the contracts of sale were accompanied with allegations of fraud, inducing them to be made, which would make the defendant liable, notwithstanding he was an infant. I do not agree with him in this view of the case. It is true that it is alleged in the complaint that the defendant in making his purchases and in obtaining credit therefor, made representations to the plaintiffs as to his means of payment and the prosperous condition of the business in which he was engaged; and then it is averred that said representations were all made with intent to induce the plaintiffs to part with their goods and give the defendant credit therefor; and that they, relying upon such representations, parted with their goods and gave him credit therefor on the strength of such representations, which they charged to be false and untrue. Giving full effect to those allegations, they are insufficient to charge the defendant with a *legal liability* on the *contracts* which the plaintiffs were, by those representations, induced to enter into with him.

They do not seek in this action to recover damages resulting from such representations on the ground of their falsity, but to *enforce the agreements on contracts of purchase* made by the defendant from time to time. Indeed, they do not allege that the statements made by the defendant to them in relation to his means and business were so made with the intent to deceive or defraud them, nor with the intent to deceive or defraud them, nor with the intention at the time, of not paying for the goods that should be sold to them, but that what was stated was said with the object of inducing them to deal with him as a purchaser on credit. Is this different *in principle* from a representation that he was of full age? That, clearly, would not have made him liable. The fact that a party is actually engaged in commercial business, thus holding himself out to the public as competent to contract, is as full and expressive a declaration to all persons with whom he is dealing that he is of age, as a

statement of that fact is to a single individual. If, under the circumstances, an infant can be held liable on his contracts, he would be deprived of all the protection which the law intended to give him.

Some of the representations on which the plaintiffs rely to hold the defendant liable appear to have been made with a knowledge on their part that he was an infant. If so, such knowledge would charge them with notice that they were dealing with a person who was under a legal disability to enter into a valid contract, and no inducement held out to them to make an agreement which he was disqualified from making, could give it validity.

Viewing this action as one founded on contract, and not based on fraud in disaffirmance of it, I am of opinion that the judgment appealed from should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

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### COBBEY *v.* BUCHANAN.

48 NEB. 391.—1896.

RAGAN, C. Before the county judge of Gage county, sitting as a justice of the peace, J. E. Cobbey sued Elmer Buchanan to recover for certain professional legal services which he alleged he had rendered Buchanan, at his request, of the reasonable value of \$50. An appeal was taken to the District Court, from the judgment of the county judge, where the case was again tried, resulting in a judgment of dismissal of Cobbey's action, to reverse which he prosecutes to this court a petition in error.

1. The answer filed by Buchanan in the District Court, so far as material here, interposed two defences: (1) a general denial; and (2) a plea of infancy.

\* \* \* \* \*

2. The second assignment of error argued is that the District Court erred in refusing to give to the jury the following instruction: "The jury are instructed that if you believe from the evidence that the defendant employed the plaintiff to perform the services for which the action is brought, and at the same time represented to the plaintiff that he had arrived at the age of twenty-one years, then you are instructed that you may consider such statements, and such declaration may be considered by you, in determining his age at the time such employment was made." The court did not err in refusing to give this instruction. (1) The instruction was asked



upon the ground that, if Buchanan had represented himself to be of age, such representation on his part estopped him from asserting the defence of infancy. This is not the law. As a general rule, the doctrine of estoppel *in pais* is not applicable to infants. *Wieland v. Kobick*, 110 Ill. 16; *Schnell v. City of Chicago*, 38 Ill. 383. In *Sims v. Everhardt*, 102 U. S. 300, the Supreme Court said: "The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. \* \* \* An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." In *Brown v. McCune*, 5 Sandf. 224, it was said: "We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he is under age, and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general. \* \* \* We are clear that the doctrine of estoppel is inapplicable to infants." We are aware that there are cases holding a party estopped from asserting the defence of infancy when he had procured some advantage, benefit, or property by fraudulently representing himself to be of age, and where the other party had believed in, relied on, and acted upon such false representations. Such are, among others, *Campbell v. Ridgley*, 13 Vict. Law R. (Aus.) 701; *Overton v. Banister*, 3 Hare, 503; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511; *Schmitzheimer v. Eiseman*, 7 Bush. 298. But in all those cases the representation made by the infant as to his age was fraudulently made, believed in, relied on, and acted upon by the other party. And in order for the representation made by an infant as to his being of age to estop him from asserting infancy as a defence, the representation must have been fraudulently made by the infant, believed in, relied on, and acted upon by the other party. *Baker v. Stone*, 136 Mass. 405. And, furthermore, such an estoppel must be pleaded. In the case at bar the reply of Cobbey to Buchanan's answer was a general denial, and there is no evidence whatever in the record that, when Buchanan represented to Cobbey that he was of age, Cobbey believed such representation, or relied on or acted upon it; in fact,

all the evidence shows that Cobbey was fully aware of the fact that Buchanan was a minor.

\*       \*       \*       \*       \*       \*       \*

The judgment of the District Court is right, and is affirmed.  
Affirmed.

### CHALMERS, J., IN *FERGUSON v. BOBO*.

54 MISS. 121, 127.—1876.

Two principles, equally ancient and equally well settled with respect to the contracts and liabilities of infants, and which, as abstractly stated, seem not antagonistic, have been found in practice to produce two conflicting lines of decision, which it is difficult to reconcile; or rather it is difficult to determine satisfactorily where one ends and the other begins. 1. The contracts of infants, except for necessities with which they have not been supplied by their guardians, impose no liability upon them which is not voidable at their election. 2. Infancy is a shield, and not a sword, and cannot be set up to defeat liability for torts, trespasses or frauds.

To give to each of these principles its appropriate force, and to prevent one from trenching upon the other, has been frequently found a matter of such difficulty, that many courts have either expressly denied or silently ignored the doctrine that an infant can be held liable in a court of law for a fraud or deceit in any manner connected with a contract; limiting such liability to acts of trespass, or pure torts, properly so called. They neither allow an action at law brought by the infant to be defeated, nor do they permit a judgment to be rendered against him, by reason of any cheat, fraud, or falsehood perpetrated or uttered by him in the course of contracts which he has entered into. They take the broad ground that the validity of his contracts is a mantle of protection thrown around him by the law, and of which all persons dealing with him must take notice; that neither an honest belief by the opposite party that he is of full age, nor a false affirmation to the same effect by himself, can change the result, since the incapacity to bind himself springs not out of the belief of either of the contracting parties upon the subject, but upon the existence of the fact of minority. They argue, therefore, that to hold the infant liable for or estopped by any fraud or falsehood, in any manner connected with the contract, whether before or at the time of making it, is to deprive him of the shield which the law has given him in consideration of his ignorance and inexperience.

All the cases holding this doctrine may be traced back to *Johnson v. Pie*, decided in 17 of Charles II., and reported in 1 Lev. 169.

That was an action on the case, "for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100, and so he had cheated the plaintiff by this false affirmation." After verdict for plaintiff, motion in arrest of judgment was made, upon the ground that action "would not lie for this false affirmation." Counsel cited *Grove v. Nevill*, 16 Car. II. Rot. 400, decided the previous year, in which it had been ruled that an action would not lie against an infant for selling a false jewel, affirming it to be a true one. To which it is answered, that this was an action of trespass on the case, and that an infant was chargeable for trespasses, though not for contracts. The judges divided. Two of them thought that the motion in arrest should be sustained, because the affirmation of an infant was void. The third judge would have denied the motion, likening the false affirmation to a trespass, or to cheating with false dice. The motion in arrest was afterwards sustained. 1 Keble, 905.

As before remarked, this judgment has formed the basis of a long line of decisions in England and America, substantially denying any redress in a court of law against the fraudulent conduct of infants in any manner connected with a contract. McPherson on Infancy, 482; *Fennings v. Rundall*, 8 T. R. 335; *Brown v. Dunham*, 1 Root, 272; *West v. Moore*, 14 Vt. 447; *People v. Kendall*, 25 Wend. 399; *Price v. Hewett*, 8 Exch. 146; *Penrose v. Curren*, 3 Rawle, 351; *Wilt v. Welsh*, 6 Watts. 9; *Brown v. McCune*, 5 Sandf. (N. Y.) 224; *Norris v. Wait*, 2 Rich. Law, 148.

The other class of decisions to which we have alluded fully recognizes the non-liability of an infant upon his contracts, but they draw a distinction between holding him upon the contract and estopping him, or making him responsible for his frauds, deceits and falsehoods, in matters connected with but not forming a constituent part of it. They say that the action brought, or the defence set up, against him must sound in tort, and not in contract; and, if it does sound in tort, it will not be defeated, although the deceit complained of was connected with the contract. Some of these cases repudiate the authority of *Johnson v. Pie*, *ubi supra*, and say that the case of *Grove v. Nevill*, referred to above, and relied upon by counsel in that case, was not in point, because the action, brought for the affirmation that the false jewel was a true one, was but an action upon the warranty, which necessarily is an action upon the contract, whereas the action for the false affirmation by the minor that he was adult, while it induced the opposite party to enter into the contract, formed no part of it. Thus, in *Fitts v. Hall*, 9 N. H. 441, an infant had bought a lot of hats, for which he executed his

note. Upon suit brought upon the note he successfully interposed the plea of infancy. An action was then brought against him for the deceit practiced in affirming, at and before the purchase, that he was an adult; and this was maintained in an elaborate opinion, reviewing the cases to some extent, and expressly disapproving of *Johnson v. Pie*. But in *Prescott v. Norris*, 32 N. H. 101, the Supreme Court of the same state, while citing *Fitts v. Hall* with seeming approbation, held that an infant, who had sold and warranted a barrel of gin as being pure, could not be held liable for a false warranty, because that was a part of the contract. So, too, in South Carolina, while in the case cited above of *Norris v. Wait*, it was said that an infant could not prejudice his rights in a court of law by neglecting to state his title to the purchaser of his property from another, yet, in the same state it was held, in *Vance v. Word*, 1 Nott & McCord, 197, that infancy was no defence to an action for a deceit practiced in selling a horse.

As shadowy and confusing as this distinction between non-liability on the contract and the liability arising from some fraud practiced in connection with it may sometimes become, it has received, in some shape, the support of a very large number of courts, and of many of the most eminent commentators, and may be said to be sustained by the weight of American, if not of English, authority.

The Supreme Court of Massachusetts went to the length of holding that, where goods had been obtained by a minor upon the false affirmation that he was of age, the fraud vitiated the contract, that no title ever vested in the minor, that he might be treated as having unlawfully converted them, and might be sued in trover or replevin. *Badger v. Phinney*, 15 Mass. 359. This doctrine is expressly sanctioned by Judge Story. Story on Contracts, secs. 107, 111.

Kent declares that "infants are liable in actions *ex delicto* whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." He warns us, however, that the act must be wholly tortious, and that "a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." 2 Kent's Com. 241. The warning is salutary; but whether it can always be heeded, and the proper line of distinction observed, is somewhat doubtful.

In the American notes to the case of *In re King*, 68 Eng. Ch. 62, s. c. 3 De Gex & J. 63, there is a summary of what seems to us, from a somewhat extended examination of the cases, to be the rule established by the great weight of American authority. It may be thus stated: In actions at law based upon a contract, it is no



answer to a plea of infancy that the infant, at the time of entering into the contract, fraudulently represented himself to be of full age, and thereby deceived the other party; nor can any action brought by the other party, which is based upon the contract, be supported or helped by an averment of such representation, or of any other frauds or deceits. But infants are liable for frauds and torts to the same extent as adults, and where actions *ex delicto* are brought to make them answerable therefor, they cannot escape the consequences of their acts, by reason of the fact that the tort or fraud was connected with a contract, unless it constituted the consideration of it. Wherever it does constitute the basis of the contract, as in an action for a breach of a fraudulent warranty, then the warning of Chancellor Kent, against being deceived by a mere change in the form of action, will apply.

These principles find illustration in the following among many other cases: *Humphrey v. Douglass*, 10 Vt. 71; *Lewis v. Littlefield*, 15 Me. 233; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Vasse v. Smith*, 6 Cranch. 226; *Walker v. Davis*, 1 Gray, 506; *Homer v. Thwing*, 3 Pick. 492; *Burley v. Russell*, 10 N. H. 184; *Kilgore v. Fordan*, 17 Tex. 341; *Fish v. Ferris*, 5 Duer, 49; *Norris v. Vance*, 3 Rich. 164; *Reeve on Domestic Relations*, 259; *Towne v. Wiley*, 23 Vt. 355; *Elwell v. Martin*, 32 Vt. 217; *Oliver v. McClellan*, 21 Ala. 675.

\* \* \* \* \*

Turning from courts of law to those of equity, we find the law of estoppel, as applicable to the contracts of infants, on a much more satisfactory and clearly defined footing. From the earliest times it has been held that infants will be estopped by a court of chancery from asserting title to property where, either by their silence or their active interference, they have entrapped third persons into purchasing it from others, or into advancing money upon it.

\* \* \* \* \*

It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at years of discretion, by direct participation, or by silence, when he was called upon to speak, has entrapped a party, ignorant of his title or of his minority, into purchasing his property from another, he will be estopped in a court of chancery from setting up such title. *Sugden on Vendors*, 507, 508; *Watts v. Creswell*, 9 Vin. Abr. 415; *Cory v. Gertcken*, 2 Madd. 40, 46; 1 Story Eq. Jur. § 385; *Hall v. Timmons*, 2 Rich. Eq. 120; *Whittington v. Wright*, 9 Ga. 23; *Herman on Estoppel*, 416, and authorities there cited. How long before this doctrine will be fully adopted by courts of law, as so many equitable principles have been, the future history of our jurisprudence must determine.

ROYCE, J., IN RAY *v.* TUBBS.

50 VT. 688, 694.—1878.

THE referee has found that the horse was overdriven, and died from the effects of such overdriving. The overdriving, which produced his death, was upon a route not embraced in the contract of bailment; and upon the authority of the cases cited, the defendant was liable in an action of tort, notwithstanding his infancy, for his value.

The note upon which this action is predicated was given in settlement of the claim for which the defendant was so liable. It is now claimed that the tort was merged in the note, and that no recovery can be had upon the note, under the elementary rule that the notes of an infant are voidable.

The rule of the common law was, that the note of an infant given for necessities was voidable. But in *Bradley v. Pratt*, 23 Vt. 378, the court held that the note of an infant given for necessities was binding; and that the liability of an infant did not depend upon the form of action, but upon the consideration upon which the claim is based. This seems to us to be a reasonable rule; and that in its application, the infant is not deprived of any right which it is the object of the law to accord to him. An infant, under certain circumstances, may pledge his credit for necessities; and if his promise to pay for such necessities is evidenced by his note, the note is collectible. The law makes him liable for his torts; and where he elects to settle such liability by giving his note, as long as the consideration for the note is open to inquiry, we see no reason why he should not be held liable in an action upon the note, to the same extent that he would be if the action had been brought upon the cause of action which formed the consideration for the note. The note in suit having been given in settlement of a claim for which the defendant was liable, and no fraud nor imposition having been practiced in obtaining it, the plea of infancy is not available to defeat it.

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HANKS *ads.* DEAL.

3 MCCORD (S. C.), 257.—1825.

THIS was an appeal from the judgment of a magistrate. The appellant, an infant, committed a tort, for which he was sued; the matter was submitted to arbitration, and the arbitrators awarded against him. The magistrate thought, that as the note was given for damages for a tort, for which he was liable, the obligation of

the note was valid. Judge Gaillard dismissed the appeal, and confirmed the decision of the magistrate.

A motion was now made to reverse the decision, because the award was voidable at least, and consequently the note was so.

JOHNSON, J. Generally all contracts made by infants are either void or voidable. The exceptions to this rule consist of contracts for his benefit; and even amongst these, the only one, perhaps, by which he is absolutely bound, is for necessities. 3 Bacon, Inf. and Age, Letters F and I.

It is true, as is contended for in support of the motion, that an infant is liable for torts; and it is concluded that therefore he is liable on his contract to make compensation for the injury, as beneficial to himself. If we give to this argument the greatest latitude, the conclusion must fail for the want of proof; for it would be difficult, if not impossible, in most cases, to ascertain the precise *quantum* of injury. The reason of the rule which exempts infants from their liability on contracts, is founded on their supposed want of capacity and discretion, and the law is so careful of the rights of infants that they are protected from contracts to pay extravagant prices even for necessities. 3 Bacon, Tit. Inf. Age, I, 593. And if the agreement be tested by this reason it must at once fall to the ground; for surely it must require at least as much capacity and discretion to contract about a tort, as about the ordinary concerns of life. The fact that the consideration of the note in question was a compensation for a tort, is an assumption not warranted by the evidence. It is true that the award was on a matter of that sort, but an infant is not bound by a submission to an award; it could not, therefore, constitute evidence of the fact. Kyd on Awards, 35. Motion granted.

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### *Crimes by Infants.*

#### THE STATE *v.* TICE.

90 Mo. 112.—1886.

SHERWOOD, J. The defendant, a boy under the age of fourteen years, became involved in a school boy scuffle, resulting in a fight, at, or near, the close of which he cut the one with whom he was scuffling with a pocket knife, hence the prosecution which terminated in verdict of guilty and a fine of one hundred dollars.

Under seven years of age an infant cannot be guilty of felony. In the interval between that age and that of fourteen years, he is

*prima facie* adjudged to be *doli incapax*. And when an infant is arraigned for a felony this disputable presumption of the law, for the *onus* in such cases is on the state, is to be rebutted, and the "evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction." 4 Black. Com. 24. In this way only can the legal maxim be applied that "*malitia supplet etatem*." Here there was no attempt made by the state to prove that the boy in question was possessed of that "mischievous discretion" which supplies the place of age, and rendered him amenable to legal punishment. This case, therefore, falls within the rule announced in *State v. Adams*, 76 Mo. 355. And as there was no evidence on which to base it, any instruction bottomed on the theory that defendant, by reason of his intelligence, was capable of crime was necessarily erroneous.

Therefore, judgment reversed and cause remanded. All concur.

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### *Capacity of Infants to Testify.*

#### WHEELER v. UNITED STATES.

159 U. S. 523.—1895.

MR. JUSTICE BREWER. On January 2, 1895, George L. Wheeler was, by the Circuit Court of the United States for the Eastern District of Texas, adjudged guilty of the crime of murder and sentenced to be hanged. Whereupon he sued out this writ of error. Three errors are alleged: First, that the indictment is fatally defective in failing to allege that the defendant and the deceased were not citizens of any Indian tribe or nation. It charges that they were not Indians nor citizens of the Indian territory. The precise question was presented in *Westmoreland v. United States*, 155 U. S. 545, and under the authority of that case this indictment must be held sufficient.

Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore v. United States*, 150 U. S. 57; *Holder v. United States*, 150 U. S. 91; *Blitz v. United States*, 153 U. S. 308.

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions



put to him on his *voir dire*, said, among other things, that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and in response to a question as to what the clerk said to him, when he held up his hand, he answered, "don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record, we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not, by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose this capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless, from that which is preserved, it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In *Brasier's Case* (1 Leach, Cr. L. 199,) it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See, also, 1 Greenleaf's Evidence, sec. 367; 1 Wharton's Evidence, secs. 398, 399 and 400; 1 Best on Evidence, secs.

155, 156; *State v. Funcau*, 88 Wis. 180; *Ridenhour v. Kansas City Cable Company*, 102 Mo. 270; *McGuff v. State*, 88 Ala. 147; *State v. Levy*, 23 Minn. 104; *Davidson v. State*, 39 Tex. 129; *Commonwealth v. Mullins*, 2 Allen, 295; *Peterson v. State*, 47 Ga. 524; *State v. Edwards*, 79 N. C. 648; *State v. Jackson*, 9 Oreg. 457; *Blackwell v. State*, 11 Ind. 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that under the circumstances of this case the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and, therefore, there was no error in admitting his testimony. These being the only questions in the record, the judgment must be affirmed.

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### *Devises and Bequests by Infants.*

#### DAVIS *v.* BAUGH.

1 SNEED (TENN.), 477.—1853.

TOTTEN, J. This case is an issue *devisavit vel non* on a writing that purports to be the will of William P. North, deceased. He made and published the writing as his will when only eighteen years of age, and shortly after died. It was held to be a valid will, as to the personal estate, and Davis, the contestant, appealed in error.

The error assigned is, that an infant under twenty-one years of age in not legally competent to make a will. It is to be observed that we have no statute provision on this subject. We must, therefore, recur to the common law for a rule of decision. There is some conflict of opinion among the writers upon ancient common law, on this subject; but the better opinion is, and so it has long been held, that an infant may make a testament of chattels, if a male, at the age of fourteen; and, if a female, at the age of twelve years.

Thus Mr. Kent: "Testaments of chattels might, at common law, be made by infants at the age of fourteen, if males; and twelve, if females." 4 Kent's Com. 506; 1 Will. on Ex. 15; 2 Bl. Com. 479; 1 Jarman on Wills, 28.

It is true that this rule, derived originally from the civil law, is the rule of the English ecclesiastical courts having jurisdiction of the subject of wills and intestate's estates. And their rules of decision upon those subjects have been received and admitted by immemorial usage as a part of the unwritten, or customary law of England; recognized and sanctioned in the common-law courts at Westminster. 1 Bl. Com. 80; 1 Will. on Ex. 15.

So that those rules of decision have become incorporated into, and form a part of, the common law of England, which as a system of law has been admitted and adopted here, so far as was consistent with the nature and genius of our institutions.

Hence, in testamentary cases, our courts constantly recur to the reported judgments of the ecclesiastic courts in similar cases, for rules of decision. Thus, it has been held that two witnesses are necessary to prove and establish a will, a rule derived from the ecclesiastical law on this subject. *More v. Steele*, 10 Humph. Rep. 562.

In this view, and for these reasons, we regard the rule in question as a part of the common law in force and use in this state.

Judgment affirmed.<sup>1</sup>

### *Capacity of Infants to Hold Office.*

MOORE *v.* GRAVES, JR.

3 N. H. 408.—1826.

**TRESPASS *de bonis asportatis*.** The case was tried here, upon the general issue, at October term, 1825, when it appeared in evidence, that one John McNeil, having sued out a writ against one Isaac Jones, the sheriff of this county deputed the plaintiff to serve the same. The deputation was on the back of the writ, and was as follows:

"I hereby constitute and appoint Jotham Moore, to serve and  
"return this writ, according to law.

"Witness my hand and seal, this 11th day of April, 1822, at the  
"risk of the plaintiff. "B. P., Sheriff."

<sup>1</sup> By 34 & 35 Henry VIII. Cap. 5,—an Act for the explanation of the Statute of Wills,—a will of real property made by a "person within the age of twenty-one years" was not to "be taken to be good or effectual in the law."

There was also on the back of the writ a certificate as follows:

"April 12, 1822. Then Jotham Moore made oath, that he would  
"serve and return this writ, according to law.

"J. B., Justice of Peace."

At the time Moore was so appointed, and when he served and returned the said writ, he was an infant, under the age of twenty-one years.

Moore, being thus deputed by virtue of the said writ, attached the goods mentioned in the plaintiff's writ, and caused the same to be locked up in a store, on the 12th of April, 1822.

On the 18th April, 1822, the defendant, being a creditor of the said Isaac Jones, sued out a writ in his own name against Jones, which he delivered to a general deputy of the same sheriff, duly deputed; and after being notified that the said goods have been attached, as aforesaid, the said Graves and the said general deputy, by direction of said Graves, broke open the said store and attached the said goods, and caused them to be removed, by virtue of the said writ in favor of said Graves.

On the part of the defendant, it was objected that the plaintiff, being an infant, was incapable of exercising the office of deputy sheriff; that the deputation and oath were informal and void; and that the plaintiff, being a special deputy, the defendant, with a general deputy, had a right to attach and remove the goods, and hold them subject to the attachment made by the plaintiff, if that attachment was legal. But a verdict was taken, by consent, for the plaintiff, subject to the opinion of the court, upon the foregoing case.

RICHARDSON, C. J. The defendant claims a new trial in this case, on two grounds. In the first place, he contends that the attachment made by the plaintiff, was void, and, therefore, gave him no right to hold the goods. In the second place, he urges, that, admitting the attachment to have been valid, a general deputy of the sheriff had a right to take away the goods, and hold them, by virtue of other legal process, against the same debtor, subject to the attachment made by the plaintiff, who was only a special deputy.

It is said that the attachment made by the plaintiff was void, for two reasons; 1st, because the plaintiff was an infant, and, by law, incapable of exercising the office of a deputy sheriff; and, 2dly, because he was not duly commissioned and sworn as a deputy.

The first question, then, to be decided is, whether the plaintiff, being an infant, was, by law, capable of discharging the duties, which he was in this instance deputed to perform. It is not necessary, in this case, to decide whether he was capable of doing all the



duties of a general deputy; his authority being special and limited, it is enough for this case to decide the question, whether he was, by law, capable of doing the particular acts which his commission authorized him to perform.

The real question, then, involved in this point, is whether an infant is, by law, capable of discharging the duties of a deputy of the sheriff, specially deputed to serve and return a particular writ of attachment.

There are provisions in our constitutions which declare persons of certain ages incapable of holding certain offices. These provisions have been adopted, because it has been generally supposed to be contrary to sound public policy to commit particular offices to the inexperience of the young, or to the decay of faculties which so frequently attends the last years of the aged. By the Constitution of the United States, no person can be president who has not attained the age of thirty-five years; nor a senator, who is under the age of thirty years; nor a representative in congress, until the age of twenty-five years. And by the Constitution of this state it is provided that no person shall be capable of being elected a senator, nor be eligible to the office of governor, who is not of the age of thirty years. It is also further declared by the same Constitution that "no person shall hold the office of judge of any court, or judge of probate, or sheriff of any county, after he has attained the age of seventy years."

And some of our statutes deny to persons of certain ages the exercise of particular powers and privileges which are granted to others. Thus, by the statute of June 23, 1815, the right of voting in any public town meeting in any matter that may come before a town, is given only to persons of the age of twenty-one years. So, by the statute of July 2, 1822, the power of disposing of real estate by will is denied to infants; and it seems, from the language of that statute, that they are incapable of being executors or administrators.

Nor were the imbecility and inexperience of early life disregarded by the common law, for it seems always to have been held that an infant could not be a juror. Coke, Litt., 157a; Littleton, sec. 259. So he could not be an attorney of a court; (Coke, Litt. 128a), nor administrator of an estate; (Lovell, 5; Godolphin, 102); nor could he act as executor until he arrived at the age of seventeen years. Lovell, 161; Godolphin, 103. So it was always held that an infant could not execute the office of a judge. Croke Eliz. 636; *Scambler v. Waters*, Coke Litt. 3b. and note 15; T. Jones, 127; 2 Lev. 245. It has also been decided that an infant could not hold the office

of clerk of a court where it was part of the duty of the office to receive the money of the suitors. 5 B. & A. 81, *Claridge v. Evelyn*.

But, notwithstanding these disabilities, there are many things which can be legally done by an infant. He is made by statute liable to do duty in the militia at the age of eighteen years. By the common law, an infant was capable of discharging the duties of an executor at the age of seventeen years. 5 Coke, 29, *Pigot's Case*. It is also well settled that females of the age of twelve, and males at the age of fourteen years, may dispose of personal property by will. Bingham on Infancy, 77; 1 Pickering, 239, *Deane v. Littlefield*.

It has long been held that infants were capable of holding certain ministerial offices. Cro. Car. 555, *Young v. Fowler*; 2 Roll. Ab. 153; Com. Dig., "Officer," B. 3; Cowper, 220, *Rex v. Carter*; Cro. Car. 279, *Young v. Stoell*. In England, the office of sheriff was in some counties formerly hereditary, and consequently might have descended to an infant. 1 Bl. Com. 339; Cro. Car. 556; 9 Coke, 97. So an infant may be, it seems, a captain in the army. 8 D. & E. 578, *Hands v. Slaney*. And it was held that an infant might be an attorney to deliver seizin, because the act was merely ministerial. Co. Litt. 52a, and note 332. So it was anciently holden that an infant might be the keeper of a gaol; and the statute of Westminster, 2 (cap. 11), was construed to extend to an infant gaoler, so as to charge him in an action of debt for an escape of one in execution. Bingham on Infancy, 73, 108.

Upon a thorough examination of the adjudged cases which bear upon the question we are now considering, we are satisfied that the principle they establish is, that some offices can, and some cannot, be held by infants. Offices where judgment and discretion and experience are essentially necessary to the proper discharge of the duties they impose are not to be intrusted in the hands of infants. But they may hold offices which are merely ministerial and which require nothing more than skill and diligence.

The plaintiff in this case was deputed to serve and return a writ. The service of the writ required an arrest of the body, or an attachment of the goods of the debtor. The return required nothing more than to send the writ to the court, when and where it was returnable, with a true statement upon it of his doings. The service and return seem, therefore, to be acts as merely ministerial as any that can be conceived.

We are not aware that the appointment of an infant in this instance could in any way have been detrimental to the public. Had the deputy, by virtue of the writ, arrested the body of a stranger, or taken the goods of a third person, the sheriff might have been

compelled to pay all damages in an action of trespass. 3 Wils. 309, *Saunderson v. Baker*; 1 Mass. Rep. 530, *Grinnel v. Phillips*; 17 Id. 244, *Campbell v. Phelps*; Doug. 40, *Ackworth v. Kempe*; 2 W. Black. 832; Hammond N. P. 82.

Nor was the debtor without ample security for any injury he might sustain from the acts or from the negligence of the deputy. Nothing can be more unquestionable than that the sheriff stands responsible for his deputies in both these respects.

With regard to the deputy himself, there seems to have been nothing in the nature of the duties he was deputed to perform which subjected him to hazards to which an infant ought not to be exposed. There was no greater responsibility in the discharge of those duties than what is every day thrown upon young men, under age, in the employment of traders and mechanics, and in various other situations.

For these reasons, we are of opinion that the attachment made by the plaintiff cannot be held to be void on the ground that he was incapable of holding the office of a special deputy in this instance.

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### *Liability of an Infant for Ante-Nuptial Debts of His Wife.*

#### ROACH & McLEAN v. QUICK.

9 WEND. (N. Y.) 238.—1832.

DEMURRER to plea. To a declaration for goods sold and delivered to the wife whilst sole, the defendants jointly pleaded that at the time of the commencement of the suit the husband was an infant within the age of twenty-one years, to wit, etc.; to which plea the plaintiff demurred.

By the court, NELSON, J. As an incident to the marriage contract which an infant is competent to enter into, he is liable to pay the debts of his wife contracted by her before marriage. Prior to her marriage, the wife was responsible for such debts, and unless the liability to pay them attached to the husband, her creditors would be remediless, as she cannot be sued alone, separate from her husband; and if she could, a judgment against her would be fruitless, as all her estate is absolutely or qualifiedly vested in her husband. Reeve's Dom. Rel. 234; Barnes, 95. The plea in this case, therefore, is bad, and the plaintiffs are entitled to judgment; the defendants have leave to amend on payment of costs.

## PART IV.

### INSANITY.

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#### *Insanity and Mental Weakness.*

LUMPKIN, J., IN MADDUX *v.* SIMMONS.

31 GA. 512, 527.—1860.

I ASSUME, in the first place, that to establish incapacity in a grantor, he must be shown to have been, at the time, *non compos mentis*, in the legal acceptation of that term; which means, not a partial, but an entire, loss of understanding. The common law has not drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. Weakness of understanding is not, of itself, any objection to the validity of the contract. If a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for the reason of his actions. *Jackson v. Caldwell*, 11 Cowen, 207; *Odell v. Buck*, 21 Wend. 142; *Stewart v. Lispenard*, 26 Wend. 298 *et seq.*; *Clarke v. Fish*, 1 Paige, 171; *Blanchard v. Nettle*, 3 Denio, 37; *Osterhout v. Shoemaker*, Id., note; Dean's Med. Jur. 555 *et seq.*; 2 Mad. Ch. Pr. *et seq.*

To establish any other standard of intellect or information beyond the possession of reason, in its lowest degree, as in itself essential to legal capacity, would, as said by Senator Verplanck, in the great case already cited, (*Stewart's Ex'rs v. Lispenard*, 26 Wend. 203), create endless uncertainty, difficulty and litigation; would shake the security of property, and wrest from the aged and infirm that authority over their earnings and savings, which is often their best security against injury and neglect. If you throw aside the old common-law test of capacity, then proofs of wild speculation or of extravagant and peculiar opinions, or the forgetfulness or prejudice of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore wise and safe. It holds, in the language of a late English commentator, (Shelford on Lunacy, p. 39), that weak minds differ from strong



ones, only in the extent and power of their faculties; but unless they betray a total want of understanding, or idiocy, or delusion, they cannot properly be considered unsound.

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*Voidability of Contracts and Conveyances.*

YOUNG *v.* STEVENS.

48 N. H. 133.—1868.

ASSUMPSIT on promise to the testatrix. The counts relied upon were upon account annexed, amounting to \$695.50, a copy of which makes part of the case, and a count for use and occupation.

The cause was tried upon the general issue, and from the opening the plaintiff's case was, that, shortly before the decease of the testatrix, who had a life interest in a small farm and owned certain stock and grain thereon, the defendant entered upon the farm and took possession of it together with such stock and grain, and occupied the house upon it, the testatrix living there also with the defendant and his family, and all living together; that the defendant did this under a contract in writing between him and the testatrix, of May 4, 1865, by which she leased to him the farm aforesaid during her life, and conveyed to him the neat stock and sheep absolutely, the defendant agreeing on his part to support the testatrix during her life; that the defendant took possession of the farm and stock, claiming a right to them by virtue of this contract, and continued to hold them until the death of the testatrix, who also continued to live in his family till her death.

Whereas, as alleged in the opening, the contract aforesaid was wholly void by reason of the mental imbecility of the testatrix, which rendered her incapable of making it, and upon that ground the plaintiff contended that no title passed to the defendant in any of the property. In regard to some of the property not embraced in this contract, but described in the account annexed, the plaintiff's case was that defendant, on taking possession of the farm, took possession also of this property, and converted it to his own use, there being no sale of it to him, or any evidence of her assent to his taking it, she being, in fact, most of the time sick.

In respect to the charge for board of defendant and family, the opening was, that they lived in the house above described during the time mentioned in the account annexed, the testatrix living with them, the defendant using in the family the grain, pork and potatoes

described in the account, without any contract in respect to them with the testatrix, or any assent or dissent by her to such use.

Upon the case as offered to be proved, the court ordered a nonsuit, and plaintiff excepted. The questions of law arising on this case were reserved for the consideration of the whole court.

NESMITH, J. The plaintiff, under his first count, seeks to recover for two weeks' board in 1864, as furnished by his testatrix to the defendant, for which the sum of \$7 is charged, and also for sundry articles of personal property, such as provisions, etc. Probably some of these may be due, and may be recovered under plaintiff's first count, as having been delivered to the defendant under an express or implied contract, binding the defendant to pay for them.

The main dispute involved in the case arises out of the special contract of the testatrix, as made with the defendant on the 4th day of May, 1865. It is understood that, under this contract, the defendant agreed to take the lands in which the said Eliza Young had a life estate, also the stock on her farm, and to support the said Eliza during her natural life; and according to the requirements of said contract, the defendant now claims the full performance, the said Eliza having deceased. On the other hand, the plaintiff claims that no title passed under this contract to defendant by reason of the incapacity of said Eliza, she at the time laboring under mental imbecility. Wherefore, the plaintiff claims that the defendant should pay for the use of the premises enjoyed by him, and for the value of the stock taken under the written contract, and for the board of self and family during its existence; in short, that the whole of said written contract should be regarded as rescinded. It will be seen that the ruling of the court stands upon the plaintiff's own statement of his case, and it will be presumed to be stated as strong in his favor as the facts will justify.

The rules, definitions and limitations, as laid down by Judge Bell, in *Dennett v. Dennett*, 44 N. H. 531, are to be regarded as safe for our guidance, as applicable to the subject of mental imbecility or insanity, when existing in either party to executory or executed contracts. Every person may be deemed of unsound mind, who has lost his memory and understanding by reason of old age, sickness, or other accident, so as to render him incapable of transacting his business, and of managing his property.

As a commentary upon this comprehensive general rule, we may remark that the common law seems not to have drawn any nice discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. *Jackson v. King*, 4 Cow. 216. When it appears

that a grantor had not strength of mind and reason sufficient to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity. In other words, a man, by the bare execution of a written instrument does not make it his deed if at the time he was so weak in mind as to be incapable of understanding it if explained to him, or the effect of the act he is about to perform. The question, then, in cases where incapacity to contract from defect of mind is alleged, is not whether a person's mind is impaired, nor whether he is afflicted by any particular form of insanity, but whether the powers of his mind have been so far affected by his disease as to render him incapable of transacting business like that in question. Weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions. The doubtful and uncertain point at which the disposing mind disappears, and where incapacity begins, can be ascertained only by an examination of all the circumstances of each particular case, to be duly weighed and considered by the court and jury; and in determining the question, the common sense and good judgment of this tribunal must be mainly relied on.

The familiar rule of evidence is adopted here that every man is presumed to be sane until the contrary appears, and the burden of proof is on the party who asserts the want of capacity. *Pettes v. Bingham*, 10 N. H. 514. Nor is there any doubt as to the rule of practice here, which is that insanity may be either pleaded or given in evidence, as a bar to an action founded either upon an executory or executed contract. *Burke v. Allen*, 29 N. H. 106; *Dennett v. Dennett*, ante; *Leaver v. Phelps*, 11 Pick. 304; *Rice v. Peet*, 13 Johns. 543; *Thompson v. Leach*, 3 Mod. 310. In England, we have the recent case of *Moulton and Wife, Admin'x, v. Camroux*, 2 Excheq. 500, wherein Chief B. Pollock has ably investigated the question, when, and how far insanity or lunacy may be an answer to a complete or executed contract, and under what circumstances such contract may not be rescinded. Pollock says: "We are not disposed to lay down so general a proposition as that all executed contracts, *bona fide* entered into, must be taken as valid, though one of the parties be of unsound mind. We think, however, we may safely conclude that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the subject-matter of the contract has been paid for and fully enjoyed, and cannot be restored, so as to put the parties in *statu quo*, such contract cannot be afterwards set aside, either by the alleged lunatic

or those who represent him. The case where this doctrine was held was *assumpsit*, brought by the representatives of the deceased person, Thomas Lee, to recover back certain annuities which had been purchased by said Lee in his lifetime, without the knowledge on the part of the officers of the annuity society of any unsoundness of mind in Lee, the trade being in the ordinary course of the affairs of human life, and fair and *bona fide* on the part of the society. It was held that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

Justice Story remarks that courts of equity will watch with the most jealous care every attempt to deal with persons *non compos mentis*, and asserts that where a contract is entered into with good faith, and is for the benefit of such person, as for necessities, courts of equity as well as courts of law will uphold it. And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set the contracts aside, if injustice will thereby be done to the other side, and the parties cannot be placed in *statu quo*, as before the purchase. In this way, as in the case of infants, this class of persons are protected. But the rule of law is used, as it was designed, for a shield. It is not allowed to work a fraud and injustice to others. 1 Story's Equity, sec. 228, and cases in note; *Neill v. Morley*, 9 Vesey, 478; 2 Kent's Com. 240; *Sprague v. Duell*, 11 Paige, Chanc. 480; *Loomis v. Spencer*, 2 Paige, Chanc. 153; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

Upon the grounds and reasons suggested in the aforesaid cases, the plaintiff will not be permitted to rescind the contract of his testatrix without showing fraud, undue advantage or imposition in the defendant; for the labor and services of the defendant have now largely entered into the contract, and they cannot be restored to him, or compensation as an equivalent be easily made therefor. The doctrine is well established that no contract can be rescinded unless both can be restored to the condition in which they were before the contract was made. If, therefore, one of the parties has derived an advantage from the performance of the contract, he cannot hold this, and consider the contract as rescinded, but must do all that the contract obliges him to do, and, in such cases, seek his remedy in damages. 2 Parsons on Contracts, 192; *Hunt v. Silk*, 5 East. 449; *Hilliard on Sales*, 308, 377; *Poor v. Woodward*, 25 Vt. 445; *Miner v. Bradley*, 22 Pick. 458; *Stevens v. Cushing*, 1 N. H. 17; *Weeks v. Robie*, 42 N. H. 316, and cases cited.

But even assuming the contract to be void in the case before us by reason of the mental imbecility of the testatrix to the extent as



alleged by plaintiff's counsel, then what will be the legal result? In such case Greenleaf says: "The executed contract of a person, alleged to be *non compos*, is to be regarded very much like that of an infant, and that, therefore, where goods have been supplied to a party, which were necessities or were suitable to his or her station or employment in life, and which were furnished under circumstances evincing that no advantage of his or her mental infirmity was attempted to be taken, and which have been enjoyed by such party, then he or she is liable in law as well as in equity for the value of the goods." 2 Greenleaf's Ev. 369, and cases in notes; 3 Car. & Payne, 30; 2 Car. & Payne, 178; Chitty on Contracts, 108; Story on Contracts, secs. 23, 24; *Kendall v. May*, 10 Allen, 62. The latter case in Massachusetts shows what may be regarded as necessities for a wealthy insane person, and is interesting in some of its illustrations. In *McCrillis v. Bartlett*, 8 N. H. 569, it has been settled, that, although the statute may avoid the contracts of spendthrifts for their protection, yet, at the same time, it does not avoid their implied contracts or liabilities for necessities. In this case, the defendant had furnished his own personal services and pecuniary aid to the spendthrift to resist the appointment of a guardian over him, upon probable grounds of success. The court held that such money and aid might be considered as necessities, as the spendthrift might resist the appointment of a guardian.

From the aforesaid legal authorities there is no doubt that the defendant is entitled to claim under his written contract compensation for any and all actual benefits rendered to the testatrix or her estate, using the term necessities in its liberal sense. And on a fair construction of the case before us, and a review of the authorities bearing on this subject, we come to the conclusion that there is nothing stated in plaintiff's case indicative of any want of good faith on the part of the defendant, nothing tending to show that he has practiced any fraud, artifice or imposition upon plaintiff's testatrix in procuring the contract. There is nothing to show that defendant had knowledge of any mental imbecility of the testatrix, provided she actually had such infirmity, and it therefore seems to us, that, so far as relates to the inception of the written contract, and the things done under it, the plaintiff cannot sustain this action, and that the nonsuit must stand. As to any claim outside of the written contract, including board and provisions, the plaintiff can proceed for whatever may be due.

HELEN S. MERRITT AND GRACE L. MERRITT v. JOHN MERRITT, AS EXECUTOR OF AND TRUSTEE UNDER THE WILL OF HANNAH B. MERRITT, DECEASED, IMPLEADED WITH OTHERS.

43 APP. DIV. (N. Y.) 68. — 1899.

THIS action was brought to foreclose a mortgage executed in the name of Hannah B. Merritt, now deceased, by George Merritt, her attorney in fact. The mortgagee, John Post, assigned the bond and mortgage to the plaintiffs. The defence was that at the time of the execution of the mortgage Hannah B. Merritt was *non compos mentis* and that she received no consideration therefor.

BARRETT, J. What we held, when this case was before us upon the former appeal, was, as correctly stated in the head-note, that "the authority of an agent acting under a power of attorney ceases or is suspended by the insanity of his principal; and where the fact of such insanity is known, both to the agent and to the party dealing with him, the contract entered into by the agent on behalf of his principal is not binding upon the latter." This precise proposition was all that the exceptions contained in the record then called upon us to decide. A different question is presented upon this appeal. Upon the second trial, now under review, the plaintiffs rested, as they did before, upon proof of the power of attorney from Mrs. Hannah B. Merritt to her son, George Merritt, of the bond and mortgage executed by the latter as such attorney to William Post, and of the assignment of the bond and mortgage by Post to the plaintiffs. It is not disputed that upon this proof the plaintiffs were *prima facie* entitled to a judgment of foreclosure and sale as prayed for. The defendant John Merritt, as executor and trustee under Mrs. Merritt's will, then proceeded with his defence. He gave evidence tending to show that, at the time when the bond and mortgage were executed, Mrs. Merritt was *non compos mentis*. Before he had completed his proofs on this head, the learned trial justice asked his counsel whether he intended to offer evidence showing knowledge on Mr. Post's part of Mrs. Merritt's insanity at the time he took the bond and mortgage. The counsel's reply was in the negative. Thereupon the court held that Mrs. Merritt's insanity, standing alone, was no defence to the action, and that the defendant was bound to prove the additional fact that Post knew of her insanity, or had reason to believe that she was insane, when he took the bond and mortgage. Acting upon this view, the learned justice declined to pass upon the question of Mrs. Merritt's sanity, and at once gave

judgment for the plaintiffs. In his decision he frankly and fairly states that "the defendant did not complete his proof as to the mental condition of Hannah B. Merritt, and I make no decision as to what her mental condition was at the time of the execution of the bond and mortgage in suit."

We think that, under the authorities in this state, this was an inaccurate view of the burden of proof. It was seemingly in accordance with the rule in England (*Campbell v. Hooper*, 3 Smale & G. 153), where Vice-Chancellor Stuart, in a similar case, said that, you must show that the contracting party, claiming under the contract (there, as here, a mortgage), knew of the lunacy of the other party and took advantage of it, before you can deprive him of the right to recover under the contract at law, and it would be very strange if a court of equity in dealing with contracts were to proceed upon a different principle. So, in *Imperial Loan Co. v. Stone*, 61 L. J. (Q. B.) 449, it was held that the burden of proving both the insanity and the knowledge of it by the other contracting party lies upon the party seeking to avoid the contract.

In this state, however, the rule is the other way. Whatever question there may be as to deeds,<sup>1</sup> it is well settled that a mortgage executed by a lunatic is voidable only. (*Ingraham v. Baldwin*, 9 N. Y. 45.) Being voidable at the election of the lunatic's personal representatives, the latter may in the first instance rest upon proof of the lunacy, and it thereupon becomes incumbent upon the mortgagee or his assignees "to show the facts necessary in equity to sustain" the instrument. *Goodyear v. Adams*, 24 N. Y. St. Repr. 31; aff'd, 119 N. Y. 650; *Riggs v. American Tract Society*, 84 Id. 330; *Hicks v. Marshall*, 8 Hun, 327; *Johnston v. Stone*, 35 Id. 380, 383. Our rule seems to be the more reasonable one. It is quite enough to put upon the lunatic's representatives the burden of proving the lunacy. That burden is by no means light. They must show that their testator, when he executed the instrument, was "so deprived of his mental faculties as to be wholly, absolutely and completely unable to understand or comprehend the nature of the transaction." *Aldrich v. Bailey*, 132 N. Y. 87, 88. When they have proved this, the party claiming under the instrument may well be called upon to show his good faith and ignorance of the insanity. If the mortgagor was insane when he signed the mortgage, the mortgagee's rights under the instrument are not *prima facie* sustainable. Equity, however, will sustain them and enforce the contract in a proper case; but the least that can then be required of the mortgagee is that he

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<sup>1</sup> That a deed is voidable and not void, see *Blinn v. Schwarz*, 177 N. Y. 252.

point out and establish the grounds upon which equity should lend him its aid. What are sufficient grounds for the enforcement of such contracts in equity has been repeatedly pointed out in the cases. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Hicks v. Marshall*, *supra*; *Riggs v. American Tract Society*, *supra*; *Johnston v. Stone*, *supra*.

The case first cited is almost directly in point. There, as here, the action was for the foreclosure of a mortgage executed by the alleged lunatic. It was defended by the committee of the lunatic. The Special Term found as a fact that the alleged lunatic was of sound mind at the time when she executed the bond and mortgage. The General Term (*Mutual Life Ins. Co. v. Hunt*, 14 Hun, 169), "conceding without now deciding" that the finding was erroneous, held that the judgment of foreclosure should be sustained upon the ground that, inasmuch as the bond and mortgage were given for a full, valuable consideration, without knowledge on the mortgagee's part of the insanity, every principle of justice required that it should be sustained. "It would," said the court, "be derogatory to the law, if, after obtaining the money from the plaintiff and using it for her own benefit, she should now be allowed to defeat the securities which she gave for the repayment." This doctrine was sustained by the Court of Appeals "both upon principle and authority;" and Judge Danforth there quoted with approval the following language of the chancellor in *Elliott v. Ince*, 7 De G., M. & G. (56 Eng. Ch.) 487: "The principle of that case (*Molton v. Camroux*, 2 Exch. [Welsby, H. & G. 487]; *aff'd in error*, 4 Id. 17) was very sound, viz., that an executed contract, when parties have been dealing fairly, and in ignorance of the lunacy, shall not afterwards be set aside, and a contrary doctrine would render all ordinary dealings between man and man unsafe." (See, also, the many cases to the same effect in this and other states cited by Judge Danforth.)

The same rule was referred to with approval in *Riggs v. American Tract Society* (*supra*), where Judge Danforth, again writing for the Court of Appeals, observed: "It is said, however, and I think justly, by the learned counsel for the defendant, that when made in good faith, for the benefit of the lunatic, without notice of incapacity, and so far performed that if rescinded the party executing cannot be placed *in statu quo*, the contract shall stand."

So in *Carter v. Beckwith*, 128 N. Y. 321, Andrews, J., said: "The courts do enforce in some cases, on equitable grounds, the acts and contracts of lunatics made before the lunacy has been formally established, where the other party has acted in good faith, without notice." (Citing in support of the proposition the *Mutual Life Case* 79 N. Y. 541.)



The rule laid down in these cases is not affected by the incident that the alleged lunatic in the case at bar acted through an agent. The equities between the original parties must still determine the question of enforcement. In his opinion upon the former appeal, Justice Rumsey thus summed up the rule on that head: "It must be held that when one undertakes to deal with an agent having a written power of attorney, he, *equally with an agent, knowing of the insanity of the principal, that the transaction thus made has no more weight* than if the transaction had been directly with the insane principal himself." We may add that it has no less weight.

In the case from which Justice Rumsey so copiously quotes (*Davis v. Lanc*, 10 N. H. 156) Chief Justice Parker also said that "The act of the agent in the execution of the power, however, may not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transaction may be held valid, and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority, and because the other party had acted upon the faith of it, and in ignorance of any termination of it."

The same limitation upon the rule of revocation or suspension resulting from the insanity of the principal was laid down in *Matthiessen & W. Refining Co. v. McMahon's Adm'r*, 38 N. J. L. 536; *Hill v. Day*, 34 N. J. Eq. 150, and *Drew v. Nunn*, L. R. (4 Q. B. Div.), 661. In *Hill v. Day* it was held that "Where a principal becomes insane after appointing an agent, the principal's insanity operates, *per se*, as a revocation or suspension of the agent's authority, except \* \* \* where a consideration of value is given by a third party, trusting to an apparent authority and in ignorance of the principal's incapacity."

In *Drew v. Nunn* the defendant's wife had authority to pledge his credit for goods. It was held that goods furnished to her, while he was insane, by a tradesman acting in ignorance of the insanity, might be recovered for. Lord Justice Brett stated the ground of the decision as follows: "The principal is bound, although he retracts the agent's authority, if he has not given notice and the latter wrongfully enters into a contract on his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife; he may be an innocent sufferer by her conduct,

but the plaintiff, who dealt with her *bona fide*, is also innocent; and where one of two persons, both innocent, must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss."

If the contract was thus enforceable in a case where the agent obtained goods from the tradesman for her own benefit upon the faith of her apparent authority, *a fortiori* is it enforceable where the contract is made directly for the benefit of the lunatic to relieve his property from a lien thereon or to swell his estate.

We have thus gone over the various features of this case more fully, perhaps, than was essential to the decision of the present appeal. We have done this to correct any possible misapprehension upon another trial of the scope of our previous decision. Upon the first trial all the defendant's evidence in support of his defence was excluded. That evidence apparently embraced notice of the insanity as well as of the insanity itself. The precise question, therefore, was whether the insanity, plus the notice, constituted a defence. We held that it did. We were not called upon to decide whether the insanity, minus the notice, constituted, *prima facie*, a defence. The defendant clearly had a right to prove notice of the insanity, but we did not hold that he was bound to do so. If his testimony sufficiently established Mrs. Merritt's insanity within the definition formulated in *Aldrich v. Bailey* (*supra*), he was, in our judgment, then and now entitled to rest; and, if his testimony on that head was not balanced by testimony subsequently adduced by the plaintiffs, he was entitled to a finding to that effect. If, upon all the testimony adduced by both sides, the court had found itself unable to make such a finding, all other grounds of equity would have disappeared, and the plaintiffs would have been entitled to judgment. If, however, the court had found the fact of insanity, then the equitable considerations to which we have referred would have supervened and have become entitled to consideration.

The plaintiffs did not prove — indeed were not called upon to prove — the facts upon which such considerations would have become material, for the reason that the court, as we have seen, gave them judgment precipitately upon an erroneous view of the burden of proof.

It is said that there is evidence that the plaintiffs, as Mr. Post's assignees, had no ice of Mrs. Merritt's insanity. But the real question on that head relates to the transaction with Mr. Post. If he was entitled, owing to the absence of notice and the advance of the full sum of \$25,000, which, as is said, went to pay off an existing

mortgage upon Mrs. Merritt's property, to enforce the security, his assignment to the plaintiffs carried the same right.

Our conclusion is that the defendant should have been permitted to complete his proof of insanity, with the right on the plaintiff's part thereupon to put in counterproofs of sanity, and also to prove any facts which would have entitled Mr. Post equitably to enforce the mortgage notwithstanding Mrs. Merritt's insanity.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

### PRENTICE, J., IN COBURN v. RAYMOND.

76 CONN. 484. — 1904.

THE contracts and conveyances of persons *non compos mentis*, when not under guardianship, are voidable, and not void. *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Ingraham v. Baldwin*, 9 N. Y. 45; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Scanlan v. Cobb*, 85 Ill. 296; *Freed v. Brown*, 55 Ind. 310.

The authorities differ as to the conditions under which, as between the parties, executed contracts or conveyances voidable for the cause stated may be avoided in equity. There are cases which hold that restitution of the consideration received is not one of the conditions. *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Nichol v. Thomas*, 53 Ind. 42; *Crawford v. Scovell*, 94 Pa. 48, 39 Am. Rep. 766. Much the greater number of cases, however, hold a contrary doctrine, and support the proposition that a deed cannot be set aside on the ground of the grantor's incompetency where the grantee acted in ignorance of the incompetency, and fairly and in good faith, unless the consideration received be refunded, or the grantee restored to his original position, and injustice thus avoided. *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Lincoln v. Buckmaster*, 32 Vt. 652; *Scanlan v. Cobb*, 85 Ill. 296; *Rusk v. Fenton*, 14 Bush, 490, 29 Am. Rep. 413; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Ashcraft v. De Armond*, 44 Iowa, 229; *Gribben v. Maxwell*, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; *More v.*

*Calkins*, 85 Cal. 177, 24 Pac. 729; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Pearson v. Cox*, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740. The English cases give their unqualified support to the rule last stated. *Shelby v. Jackson*, 6 Beavan, 192, 200; *Neill v. Morley*, 9 Ves. Jr. 478; *Molton v. Camroux*, 2 Exch. 487; *Campbell v. Hooper*, 3 Sm. & Giff. 153. See also 2 Pomeroy's Equity Jurisp. § 946; 1 Story's Equity Jurisp. §§ 227, 228; 1 Devlin on Deeds, § 76. The first case to assert the doctrine that there might be a rescission without restoration we believe to have been *Gibson v. Soper*, 6 Gray, 279, 66 Am. Dec. 414. The judge who wrote the opinion of the court found no little difficulty in harmonizing its views with the opinion rendered by Chief Justice Shaw in the then recent case of *Arnold v. Richmond Ironworks*, 1 Gray, 434, wherein a contrary doctrine was stated in plainest terms. The decision in *Hover v. Hobson*, 53 Me. 451, 89 Am. Dec. 705, followed about ten years later, and adopted the views of the Massachusetts case. These two cases contain all that has been or can be said in favor of the position assumed. The reasoning of the court is grounded upon the watchful concern which equity maintains, and ought to maintain, over those who are incapable of managing their affairs. The law, it is said, makes their very incapacity their shield, so that in their weakness they find their protection. An analogy is drawn between infants and persons *non compos mentis*, and it is said that the law intends that he who deals with either shall do so at his peril. Pursuing the assumed analogy, the proposition is laid down that the right of the insane to avoid their contracts, like that of infants, is absolute and paramount, and superior to all equities of other persons, however far removed in the chain of title. The argument is that, if restitution was required as a condition precedent to cancellation, that might be indirectly accomplished which the law does not permit, and the great purpose of the law in securing the protection of those who cannot protect themselves be thus defeated. The answer to this argument is obvious. It sees only the rights and interests of one party, and makes them paramount over all other considerations. A proceeding to set aside an incompetent's conveyance is one in equity. The powers invoked are equitable, and call for the exercise of the broadest equity. 2 Story's Equity Jurisp. (12th ed.) § 1365d. When the case involves an innocent, *bona fide* grantee, the court has before it two innocent parties, between whom it is in duty bound to do equity to the best of its ability. It has no right to shut its ears to the claims of either party. To say that one, however innocent he may be, and however fair his dealings, who chances to deal with an incompetent, does so at his peril, and can have no consideration in a court of equity when he is



about to be deprived of both his property and the consideration paid for it, is to hold a harsh doctrine, which might easily transform the incompetent's shield into a sword. Cases of this character furnish no exception to the maxim that he who seeks equity must do equity, so that if, on the whole case, it would be inequitable to set aside a conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity. 2 Story's Equity Juris. § 1365d. The argument under review also forgets the provisions which are made by statute for the protection of the property interests of incapable persons, and the prompt redress of their wrongs. It is made easy to put such persons beyond the power of contracting or disposing of their estate, and to provide a competent substitute to secure redress when occasion arises. It may be safely assumed that the friendly or selfish interest of friends or relatives will, in the presence of so simple a recourse, leave few incapable persons possessed of estate free to dissipate it, or, in the event of a wasteful bargain or disposition by one whose power has not been legally restrained, that such interest will prompt to speedy action, which will lead to an intelligent conservation of the incompetent's interests before delay has witnessed the dissipation of the consideration received, or permitted substantial changes in the status of the *bona fide* grantee. These considerations deprive of much of their force the arguments for the extreme doctrine laid down in the Massachusetts and Maine cases, which is therein drawn so strongly from the necessities of the situation, and the consequences to incompetents assumed to flow from any other doctrine.

The assumed analogy between the status of infants and incompetents, of which so much is made, especially in the Maine case, is by no means a perfect one, and may easily be carried too far. It is one thing to hold that he who does not discover the tangible, definite, and ascertainable status of minority must suffer the consequences, and quite another to say that he who fails to detect the existence of the subtle, elusive, and sporadic condition of mental unsoundness, and to correctly measure its degree, cannot be heard in a court of equity to plead his ignorance and good faith. There are practical reasons for the protection of an infant, who cannot be put into a position where his acts become a nullity, and who, it is said, cannot, or at least may not, make a disaffirmance of his conveyances of realty until time has brought him to his majority, which do not exist in the case of the incapable person. Reeve's Domestic Relations, 254. In this connection it is to be noticed that the cases in question do not stop with the logical consequences of the analogy assumed. In both states the contemporaneous view seems to have been that, if an infant

disaffirm his contract, he must restore the consideration, in so far as he had it in his hands. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Bartlett v. Cowles*, 15 Gray, 445; *Boody v. McKenney*, 23 Me. 517. In the case of incompetents, there is no hint of a duty to restore under any circumstances, as involved in the right of equitable cancellation. In so far as this state is concerned, argument from the analogy referred to would support the proposition that restoration was a condition precedent to an incompetent's rescission of an executed contract or conveyance, where the other party had acted in ignorance of the disability, and fairly and in good faith, since the privilege of avoidance is, under similar circumstances, refused to an infant who has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position. *Riley v. Mallory*, 33 Conn. 201; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53. The true principle, however, would appear to be that the incidents of those contracts and conveyances which the law regards as voidable, whether by reason of fraud, duress, intoxication, infancy, mental disability, or other cause, differ according to the circumstances which give rise to the defect, and that each class of cases stands in a court of equity upon a more or less independent footing; the status and incidents of each to be determined by all the conditions and considerations involved, as they appeal to the judicial conscience. One deduction by analogy, however, seems fully justified; and that is that, if restitution is required of an infant, it should be required on the part of an incompetent not under guardianship, in favor of one who has dealt with him in ignorance and good faith. Both reason and authority, by way of analogy, in this jurisdiction, therefore, appear to us to support, as the best general rule, the proposition hereinbefore stated as having the support of the English and the greater number of American cases. It needs no argument to demonstrate that, if restitution must be made to the immediate grantee of the incompetent, subsequent grantees who take the title in like good faith and ignorance of the incompetent's disability are entitled to be restored to their original position, before they can be deprived of their property by the intervention of a court of equity.

SEAVER *v.* PHELPS.

11 PICK. (MASS.) 304.—1831.

TROVER, to recover the value of a promissory note, pledged by the plaintiff to the defendant. The suit was brought on the ground that the plaintiff was in a state of insanity at the time when he made the pledge. At the trial in the Common Pleas, before Williams, J., the counsel for the defendant requested the judge to instruct the jury, that although they should believe the plaintiff was insane and incapable of understanding at the time of making the contract, yet that if the defendant was not apprised of that fact, or had no reason, from the conduct of the plaintiff or from any other source, to suspect it, and did not overreach or impose upon the plaintiff, or practice any fraud or unfairness, then the contract was not to be annulled. But the judge held this not to be law, and instructed the jury otherwise; and the jury returned a verdict for the plaintiff.

To this opinion the defendant excepted.

WILDE, J. The general doctrine that the contracts, and other acts *in pais*, of idiots and insane persons, are not binding in law or equity, is not denied. Being bereft of reason and understanding, they are considered incapable of consenting to a contract, or of doing any other valid act. And, although their contracts are not generally absolutely void, but only voidable, the law takes care effectually and fully to protect their interests; and will allow them to plead their disability in avoidance of their conveyances, purchases and contracts, as was settled in *Mitchell et al. v. Kingman*, 5 Pick. 431. And such is probably the law in England at the present day, although the doctrine for a long time prevailed there, that no one should be allowed to plead his own incapacity and to stultify himself. These principles are not controverted by the defendant's counsel; but they maintain, that if the plaintiff was of unsound mind and incapable of understanding, at the time he pledged the note to the defendant, yet if the defendant was not apprised of that fact, or had no reason to suspect it from the plaintiff's conduct, or from any other source, and did not overreach him, or practice any fraud or unfairness, then that the contract of bailment was valid and binding, and could not be avoided in the present action. And they requested the Court of Common Pleas so to instruct the jury. That court, however, were of opinion that the law was otherwise, and we all concur in the same opinion. If it had been only proved that the plaintiff was a person of weak understanding, the instructions requested would have been appropriate and proper. For every man

after arriving at full age, whether wise or unwise, if he be *compos mentis*, has the capacity and power of contracting and disposing of his property, and his contracts and conveyances will be valid and binding, provided no undue advantage be taken of his imbecility.

It is sometimes difficult to determine what constitutes insanity, and to distinguish between that and great weakness of understanding. The boundary between them may be very narrow, and, in fact, often is, although the legal consequences and provisions attached to the one and the other, respectively, are widely different.

In the present case, however, this point is settled by the verdict, and no question is made respecting it. We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant; and this being admitted, we think it cannot avail him as a legal defence, to show that he was ignorant of the fact, and practiced no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.

The defendant's counsel rely principally on a distinction between contracts executed, and those which are executory. But if this distinction were material, we do not perceive how it is made to appear that the contract of bailment is an executed contract, for if the note was pledged to secure the performance of an executory contract, and was part of the same transaction, it would rather be considered an executory contract. But we do not consider the distinction at all material. It is well settled that the conveyances of a *non compos* are voidable, and may be avoided by the writ *dum fuit non compos mentis*, or by entry.

The case of *Bagster et al. v. The Earl of Portsmouth*, 5 Barn. & Cressw. 172, but more fully reported in 7 Dowl. & Ryl. 614, has been relied on as countenancing the distinction contended for, and to show its bearing on the point in question; and it is true that some of the remarks which fell from the court in giving their opinion, may be thought to have some bearing in this respect. But the point decided, and the grounds of the decision, not only fail to support the defence in this action, but may be considered as an authority in favor of the plaintiff. That was an action of assumpsit for the use of certain carriages hired by the defendant, he being at the time of unsound mind, and judgment was rendered for the plaintiff, on the ground that no imposition had been practiced on his part; and particularly because the carriages furnished appeared to be suitable to the condition and degree of the defendant, considering the contracts of a *non compos* on the same footing as those of an infant; and the court say, in *Thompson v. Leach*, 3 Mod. 310, "that the grants of infants, and of persons *non compos*, are parallel both in law and



reason." Now, no one would, we apprehend, undertake to maintain that the plaintiff would have been bound, if he had been a minor when he pledged the note. It does not appear to have been pledged for necessities; and all contracts of infants are either void or voidable, unless made for education or necessities suitable to their degree and condition. And even if the note had been pledged as security for the payment of necessities, it would have been binding if the plaintiff had been an infant. For a pledge is in the nature of a penalty, and may be forfeited, and can be of no advantage to the infant, and therefore shall not bind him.

If, then, idiots and insane persons are liable on their contracts for necessities, they are certainly entitled to as much protection as infants. It matters not, however, how this may be, since the contract in question is not one for necessities.

In the case of *Brown v. Foddrell*, 1 Moody & Malkin, 105, Lord Tenterden expressed an opinion, that in assumpsit for goods sold and delivered, and for work and labor, it would be no defence that the defendant was of unsound mind, unless the plaintiff knew of, or in any way took advantage of, his incapacity, to impose on him. This, however, was an opinion expressed at *nisi prius*, and whether the opinion was followed up to the final decision of the cause or not, does not appear. But, however this may be, the opinion is founded on the old rule, somewhat qualified, that no one can be allowed to plead his own disability or incapacity, in avoidance of his contracts. This rule having been wholly exploded in this commonwealth, Lord Tenterden's opinion can have no weight here, unless some good reason could be shown for overruling the case of *Mitchell et al. v. Kingman*, which we think cannot be done.

We are aware that insanity is sometimes hard to detect, and that persons dealing with the insane may be subjected to loss and difficulty; but so they may be by dealing with minors. The danger, however, cannot be great, and seems to furnish no sufficient cause for modifying the rules of law in relation to insane people, if we had any power and authority so to do; which we have not.

Judgment of C. C. P. affirmed.

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## THE IMPERIAL LOAN COMPANY, LIMITED *v.* STONE.

[1892.] 1 Q. B. 599. (ENG.)

THE action was brought on a promissory note which the defendant, who had since the making of the note, been found by inquisition to be a lunatic, signed as surety. The statement of defence alleged

that the defendant when he signed the note was so insane as to be incapable of understanding what he was doing, and this allegation was repeated with the further allegation added that the insanity of the defendant was known to the plaintiffs.

The case was tried before Denman, J., who left to the jury the questions whether the defendant, when he signed the note, was so insane as not to be capable of understanding what he did, and whether this incapacity was known to the agent of the plaintiffs who was present when the note was signed. The jury found that the defendant was insane when he signed the note; but they could not agree upon the question as to the knowledge of plaintiff's agent. The learned judge entered a verdict for the defendant. The plaintiffs applied for judgment or for a new trial.

LORD ESHER, M. R. In this case judgment has been entered for the defendant on the findings of the jury, although the jury have not agreed on one of the questions left to them. If we are of opinion that the entry of judgment is wrong, no other course is open to us but to direct a new trial.

The action is on a promissory note signed by the defendant as surety, and his answer is that he was so insane at the time he signed the note that he was not capable of understanding the transaction, and the jury have found that this was so. The defence added another matter, namely, that the plaintiffs knew of the defendant's state, and on that point the jury have been unable to agree. This raises the questions whether that allegation is a necessary part of the plea, and if so, on whom the burden of proving it lies.

I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shows that the law as I have stated it was generally accepted. The burden of proof, in such a case, must lie on the defendant; the jury have dis-

agreed on a material question in the cause, and as there is no finding on that question, the case must go back for a new trial.

FRY, L. J. I also disagree with the conclusion of the learned judge. The law relating to this matter I take to be of very old date, and much light is thrown upon it by Littleton in his Treatise on Tenures. That learned author, in treating of descents, laid down (Litt. sec. 405) that "no man of full age shall be received in any plea by the law to stultify and disable his own person;" but he went on to point out that the heir can avoid a deed made by a person *non compos mentis*, though the person himself could not. The subject came before the Court of King's Bench in *Beverley's Case* [4 Co. Rep. 123b.], where the court laid down, "that every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself," and reference was made to Littleton's Tenures. Before that date, Fitzherbert (F. N. Br. 202 D.) took a different view; but his view was overruled by *Stroud v. Marshal*, Cro. Eliz. 398. Then came Coke, who adopted the view of Littleton (Co. Litt. 247b.), who, he said, was of opinion "that neither by plea nor by writ nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was *non compos mentis*) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so it was resolved with Littleton, in *Beverley's Case* [4 Co. Rep. 123b.], where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe." Therefore, although in certain cases the Crown, and in other cases persons who claimed under one who was *non compos mentis*, could set up the disability, the man himself could not. In *Molton v. Camroux* [2 Ex. 487], which was affirmed in the Exchequer Chamber, [4 Ex. 17], Pollock, C. B., in delivering the judgment of the court, said the rule had in modern times been relaxed, and unsoundness of mind would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, "and the plaintiff knew it," and for this he referred to *Brown v. Foddrell* [1 Mood. & M. 105]; *Baxter v. Earl of Portsmouth* [5 B. & C. 170]; and *Dane v. Viscountess Kirkwall* [8 C. & P. 679]. It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is *non compos mentis* may be avoided when his condition can be shown to have been known to the plaintiff. So far as I know, that is the only exception. The question whether that knowledge exists has not

been determined in this case, and consequently we cannot say that the exception applies, and judgment could not properly be entered for the defendant. There must, therefore, be a new trial.

LOPES, L. J. It seems to me that the principle to be deduced from the cases may be summarized thus: A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed. Applying that in the present case, it is apparent that the verdict entered for the defendant cannot stand, but that there must be a new trial.

Order for new trial.

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### ALLEN *v.* BERRYHILL.

27 IA. 534.—1869.

DILLON, CH. J. In substance, this action is one to recover judgment upon the notes made by the defendant to Allen. Incidentally, authority is asked to enable a deed of the property to be made when the purchase money shall be paid. It is not a case where a specific performance is sought, which rests in the discretion of the court to grant or refuse, according to circumstances.

The case should be regarded, and will be treated, in settling the law applicable to it, as if it were in form, as it is in substance, an ordinary action upon the notes.

The subject of the contracts of insane persons was recently before the court in the case of *Behrens v. McKenzie*, 23 Iowa, 333. The general subject was quite fully examined at that time by the counsel who argued it, and by the court. It was remarked in the opinion delivered therein, that "the decided cases are far from being uniform on the subject of the liability or extent of liability of persons of unsound mind for acts and contracts done and made while in this condition." \* \* \* "The state of the law is such as to allow us to decide this case upon principle."

The conflicting and very unsatisfactory state of the authorities thus referred to is so fully exhibited in the separate opinion of our



brother Cole (in whose conclusion, however, the other members of the court cannot concur), that it is not deemed necessary more particularly to refer to them in the present opinion.

The peculiarity of the case now under consideration consists in the fact that the representative of the party alleged to be insane, and with whom the contract was made, is the party seeking to have it enforced. It is the same party to the contract that makes defence, and the defence is that the other party to the contract was totally insane at the time it was entered into. No such case, that is, no case where it was the same party who set up as a defence that his adversary was insane, was referred to by counsel, nor is any such referred to among all those which have been so industriously and carefully collected by Mr. Justice Cole. This circumstance is regarded as important, and as distinguishing the case from those in which it is the insane party who pleads his incapacity and seeks to prevent the sane party to the contract from enforcing it against him. It is the opinion of the court that justice and sound policy concur in requiring it to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defence to the sane party merely to show that the other party was *non compos mentis* at the time the contract was made.

There are obvious reasons, founded on the justice and propriety of protecting those whom the visitations of providence have incapacitated from protecting themselves, against contracts which are discovered to be prejudicial to their interests. Their incapacity to contract is a shield which the law places in their own hands to protect them, not a sword in the hands of others with which to cut down their rights. If a person who is of unsound mind, or who is afterwards shown to have been of unsound mind, shall chance to make a contract which is really advantageous to him, can a satisfactory reason be given why he should not have the right to enforce it? No such reason occurs to us.

The reason advanced by the appellant is, that in law two minds must concur to make a contract; that where one of the parties is insane, there are not two minds capable of contracting; hence there is and can be no contract; and, therefore, no liability by either party to the other thereon. It cannot be denied that there is to the legal mind, prone to draw and often delighting to indulge in refined and acute distinctions, much that is plausible in the ground here assumed. But, after all, is that ground really tenable? As applied

to this case, the defendant says to the plaintiff: "You cannot recover because you have no contract." The plaintiff replies, "But I have a contract; here it is; it consists in your own notes." Now what does the defendant rejoin: "I admit you have my notes, but, though signed by me, they are not, in legal contemplation, my act, because you have no power to agree to take them." Is this rejoinder not subtle rather than substantial? In fact, the plaintiff has the promise or contract of the defendant, and, if fairly obtained, it ought to be no defence to a sane defendant that the plaintiff's mind was not sound at the time the contract was made.

The objection relied on by the defendant is one of the many difficulties which have arisen out of the use of the words "void" and "voidable," and the uncertain extent of meaning attached to them. The conclusion which we reach derives a very strong support in the analogies of the law. Thus, if an infant make a contract with one of full age, it may, as is well known, be enforced by the infant against the adult, but not by the adult against the infant, if the latter pleads (and the plea is purely personal) his disability.

So, also, the same doctrine applies to the disability of coverture. And this court has decided, that, while, as a general rule, it is true that the discharge of a principal releases a surety, yet it holds that "where a person *sui juris* becomes surety for a married woman, a minor, or other person incapable of contracting," the surety is bound, notwithstanding a successful plea of disability on the part of the principal. *Jones v. Crosthwaite*, 17 Iowa, 393, 396, and cases cited. Another illustration: Delivery is essential to a deed, and acceptance essential to delivery, and there can be no acceptance without mental assent. This is a general rule of law, and yet a deed made to an infant or to a lunatic, although there be no mental capacity capable of understanding the nature of the instrument, is valid. The law supplies or presumes the requisite assent to an act beneficial to the party; or it dispenses with it. So here. Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or, for his protection, estops the other party to set up and sustain this objection. The subject might be further elaborated, but it is scarcely needful to do so.

It is the opinion of the majority of the court that the eighth count of the answer pleaded no sufficient defence, and this conclusion is strengthened by the consideration that it is not alleged therein that the incapacity of Allen was unknown to the defendant at the time the contract was made. If the contract was made by the defendant

with knowledge of Allen's situation, his claim to make this defence is thereby weakened.

The allegation of Downey's insolvency is no defence to the present action. This is so obvious as not to require any special notice.

Affirmed.

COLE, J., dissenting.

## ALLIS v. BILLINGS.

6 MET. (MASS.) 415. — 1843.

WRIT of entry to recover seven acres of land.

DEWEY, J. The question raised in the present case is, whether the deed of one who is insane, at the time of the execution thereof, is void absolutely, or merely voidable.

The term "void," as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable;" it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms "void" and "voidable," in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term "void" can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification.

This question, then, arises: Is the deed of a person *non compos mentis* of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaries, vol. ii, p. 291, states the doctrine thus: "Idiots, and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable, but not actually void."

Chancellor Kent says: "By the common law, a deed made by a person *non compos* is voidable only, and not void." 2 Kent's Com. (4th ed.) 451. In *Writ v. Maxwell*, 5 Pick. 217, this court adopted the same principle, and directly ruled that the deed of a *non compos*, not under guardianship, was not void, but voidable. Such

a deed conveys a seizin to the grantee, and the deed, to that extent, is valid, until, by entry or action, the same is avoided. *Mitchell v. Kingman*, 5 Pick. 431, is to the like effect. In *Seaver v. Phelps*, 11 Pick. 305, the contracts of insane persons are noticed as contracts not absolutely void but voidable.

It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract, viz., that of parties capable of giving an assent to such a contract. But this objection as strongly applies to cases of deeds executed by infants, who are alike wanting in capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it to some present purposes effectual and susceptible of complete future ratification, is well settled and understood as to infants who enter into contracts; and it will be found that there is a common principle on this subject, alike applicable to the inability of a contracting party, arising from lunacy or infancy. The civil and the common-law writers group together idiots, madmen, and infants, as parties incapable of contracting for want of a rational and deliberate consenting mind. 1 Story on Eq. sec. 223, and authorities there cited.

It is true that the rule of the common law, as held at one time seemed to sanction, in one particular, a most unwarrantable distinction between the cases of deeds made by persons *non compos* and those made by infants; holding that the former could not be avoided by the party, upon the ground that no man of full age should be admitted to stultify himself, although it allowed privies in blood, or privies in representation, after the death of the *non compos*, to avoid the deed, on the ground of incapacity in the grantor. This distinction has not been adopted by our courts. On the contrary, we hold that such conveyance by one *non compos mentis* may be avoided by himself, as in the case of an infant grantor. This principle was directly recognized in the case of *Mitchell v. Kingman*, 5 Pick. 431. Indeed, the English rule has, in modern times, been often questioned in England; and in the courts of our sister states, it has received little if any sanction. 1 Story on Eq. sec. 225, and cases there cited.

It was urged by the demandant's counsel, that the doctrine that the deed of a *non compos* person was voidable only, and not void, was to be limited to feoffments, or cases where there is a livery of seizin, or what is equivalent, and would not embrace a conveyance by an unrecorded deed. But we do not think that such a distinction can be maintained. As between the grantor and grantee, such unrecorded deed is good and effectual, by force of our statute; and



the effect of such a conveyance would be to vest the title of the grantor in the grantee immediately upon the execution of the deed, and before the same is recorded. *Marshall v. Fisk*, 6 Mass. 31. A deed made in proper form, and duly acknowledged and recorded, is, in this commonwealth, equivalent to a feoffment with livery of seizin. *Somes v. Brewer*, 2 Pick. 197. Without the registry, where the delivery of the deed is accompanied by the surrender of the possession of the conveyed premises to the grantee, the effect would be the same, as to the conveyance by a *non compos*, as would result from a feoffment made by him. A deed of bargain and sale, it is said, places the grantee upon the footing of a feoffment, as it passes the estate by the delivery of the hand; such grants or deeds as take effect by delivery of the hand being voidable only. *Somes v. Brewer*, 2 Pick. 197; *Zouch v. Parsons*, [3 Burr. 1794]. We come, therefore, to the result, that the deeds of infants, and insane persons are alike voidable, but neither are absolutely void.

Upon the trial of the present action, the plaintiff put his case upon two distinct grounds: 1st. That he was insane at the time he executed the deed under which the tenant derives his title; 2d, That the deed was obtained by undue influence and fraud on the part of the tenant. Upon both these points the plaintiff introduced evidence. What was the extent of the evidence upon the latter ground, and what would have been the finding of the jury upon that point, we have no means of judging. This was a distinct and independent ground, and one which, if found in favor of the demandant, might have been decisive of the case, but which, in the final disposition of the cause, was not considered or passed upon by the jury.

All the evidence, therefore, bearing upon this point, is now to be treated as if never offered, and the sole inquiry for our consideration is, whether the instructions of the court were such, in matter of law, that the verdict may be maintained, taken as it was upon the first ground solely. The presiding judge ruled, as a matter of law, that a deed of an insane person was absolutely void. Under this ruling, all that was required of the demandant, to entitle himself to a verdict in his favor, was to show a temporary insanity at the time of the execution of the deed. No matter what might have occurred subsequently, or how soon afterwards the demandant might have been restored to a sound mind; no matter what acts of confirmation may have been done by him, or however fully he may have adopted and ratified the transaction, by the receipt of money or other valuable consideration paid for the land; still the legal title in the land would be in him. This was the necessary result of the doctrine, that the deed of a *non compos* was absolutely void, while, if it had

been held only voidable, these subsequent acts of the party might materially affect the verdict of the jury. But, adopting, as we do, the principle that the deed of an insane person is only voidable, this, while it gives the insane grantor full power and authority to avoid his deed, and thus furnishes full protection to him against all acts injurious to his interests, done while he was *non compos*, also entitles the other party to set up the deed, if he can show a ratification or adoption of it by the grantor, after he is restored to a sound mind. If the grantor, when thus capable of acting, and with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and ratify them; if he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane,—it is competent for him to do so. But the consequence will be to give force, effect, and legal validity to his contract, which was before voidable.

In the present case, therefore, upon the point first relied upon in the defence, viz., that the demandant was insane when he executed the deed, the jury should have been instructed that this fact, if established, rendered the deed voidable, and that it was competent for the demandant to avoid it on that ground, if not estopped by his subsequent acts, done while in his right mind; but that a voidable deed was capable of confirmation; and that, if the grantor, in his lucid intervals, or after a general restoration to sanity, then being of sound mind, and well knowing and understanding the nature of the contract, ratified it, adopted it as a valid contract, and participated in the benefits of it, by receiving from the purchaser the purchase-money due on the contract, this would give effect to the deed, and render the same valid in the hands of the grantee, and would thus become effectual to pass the lands, and divest the title of the grantor. Such instructions would have presented the question in issue in a different aspect to the jury, and might have led to a different result upon the only point upon which they passed.

Verdict set aside, and a new trial granted.<sup>1</sup>

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<sup>1</sup> "It is insisted by the learned counsel for the appellant that a deed made by a lunatic is 'voidable only and not absolutely void.' We think the weight of authority is against the proposition. *Van Deusen v. Sweet*, 51 N. Y. 378; *Valentine v. Lunt*, 115 Id. 497; *Riggs v. American Tract Society*, 95 Id. 503. This court is already committed upon the proposition by its decision in *Goodyear v. Adams* (5 N. Y. Supp. 275; s. c., affirmed, 119 N. Y. 650), and the doctrine finds support in *Aldrich v. Bailey* (28 N. Y. St. Rep. 571), and in *Johnson v. Stone* (35 Hun, 383); *Carter v. Beckwith* (40 N. Y. Rep. 347)." — HARDIN, P. J., in *Brown v. Miles*, 61 Hun, (N. Y.) 453, 456. But see *Blinn v. Schwarz*, 177 N. Y. 252.

"But even if the evidence established the fact of his insanity, we think the evidence abundantly shows that he had lucid intervals. And from the testimony

*Valid Contracts : Necessaries.*SCEVA *v.* TRUE.

53 N. H. 627.—1873.

LADD, J. \* \* \* The other facts stated in the motion (which is to be regarded rather as an agreed case than a motion to dismiss) stand upon a different footing, inasmuch as they go to the merits of the case, and may be pleaded in bar or given in evidence under the general issue, and, when so pleaded or proved, their legal effect will be a matter upon which the court, at the trial, must pass. Some suggestions upon this part of the case may therefore be of use.

We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessities furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact,—no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract,—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury,—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

Suppose a man steals my horse, and afterwards sells it for cash:

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of the justice of the peace, who took the acknowledgment of the deed; of Philips, who was present when the contract was entered into; of Mrs. Lilly, who saw him immediately before; and of Samuel P. Lilley, who saw him immediately after the sale, we think it abundantly appears that he was then sane."—WALKER, J., in *Lilley v. Waggoner*, 27 Ill. 395, 399.

the law says I may waive the tort, and recover the money received for the animal of him in an action of assumpsit. Why? Because the law, in order to protect my legal right to have the money, and enforce against the thief his legal duty to hand it over to me, implies a promise, that is, feigns a promise when there is none, to support the assumpsit. In order to recover, I have only to show that the defendant, without right, sold my horse for cash, which he still retains. Where are the circumstances, the language or conduct of the parties from which a meeting of their minds is to be inferred, or implied, or imagined, or in any way found by the jury? The defendant never had any other purpose but to get the money for the horse and make off with it. The owner of the horse had no intention to sell it, never assented to the sale, and only seeks to recover the money obtained for it to save himself from total loss. The defendant, in such a case, may have the physical capacity to promise to pay over to the owner the money which he means to steal; but the mental and moral capacity is wanting, and to all practical intents the capacity to promise according to his duty may be said to be as entirely wanting as in the case of an idiot or lunatic. At all events, he does not do it. He struggles to get away with the money, and resists with a determination never to pay if he can help it. Yet the law implies, and against his utmost resistance forces into his mouth, a promise to pay. So, where a brutal husband, without cause or provocation, but from wanton cruelty or caprice, drives his wife from his house, with no means of subsistence, and warns the tradesmen not to trust her on his account, thus expressly revoking all authority she may be supposed to have, as his agent, by virtue of the marital relation, courts of high authority have held that a promise to pay for necessities furnished her while in this situation, in good faith, is implied by law against the husband, resting upon and arising out of his legal obligation to furnish her support. See remarks of SARGENT in *Ray v. Alden*, 50 N. H. 83, and authorities cited. So, it was held that the law will imply a promise to pay toll for passing upon a turnpike road, notwithstanding the defendant, at the time of passing, denied his liability and refused payment. *Proprietors of Turnpike v. Taylor*, 6 N. H. 499. In the recent English case of *The Great Northern Railw. Co. v. Swaffield*, L. R., 6 Exch. 132, the defendant sent a horse by the plaintiff's railway directed to himself at S. station. On the arrival of the horse at S. station, at night, there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused



to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined, and went away without the horse, which remained at the livery stable. The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm, and with payment of a sum of money for his expenses and loss of time. Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it; and it was held that the defendant was liable, upon the ground of a contract implied by law, to the plaintiffs for the livery charges thus paid by them.

Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course, this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law, which seems to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions *ex contractu*, or actions *ex delicto*. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.

All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term implied contract. In the discussion of any subject, there is always danger of spending breath and strength about mere words, as well as of falling into error when the same term is used to designate two different things. If the term, implied contract, be used indifferently to denote (1) the

fictitious creation of the law spoken of above; (2) a true or actual but tacit contract, that is, one where a meeting of the minds or mutual understanding is inferred as matter of fact from circumstances, no words, written or verbal, having been used; and (3) that state of things where one is estopped by his conduct to deny a contract, although, in fact, he has not made or intended to make one,—it is not strange that confusion should result, and disputes arise where there is no difference of opinion as to the substance of the matter in controversy: whereas, were a different term applied to each, as, for example, that of a legal duty to designate the first, contract, simply, to designate the second, and, contract by estoppel, the third, this difficulty would be avoided. It would of course, come to the same thing, in substance, if the first were always called an implied contract, while the other two were otherwise designated in such way as to show distinctly what is meant. This is not always done, and an examination of our own cases would, perhaps, show that more or less confusion has arisen from such indiscriminate use of the term. A better nomenclature is desirable. But whatever terms are employed, it is indispensable that the distinction, which is one of substance, should be kept clearly in mind, in order that the principles governing in one class of cases may not be erroneously applied to another. See remarks of Smith, J., in *Bixby v. Moore*, 51 N. H. 402, and authorities cited at page 404.

Much may doubtless be said against supplying a remedy for the enforcement of a plain legal right "by so rude a device as a legal fiction"—Maine's *Ancient Law*, 26; but, at this time of day, that is a matter for the consideration of the legislature rather than the courts. The remedy of *indebitatus assumpsit* can hardly be abolished in that large class of cases where it can only be sustained by resorting to a fiction until some other is furnished to take its place.

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessities furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question, the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff's intestate that he was to be paid. Again: the jury are to consider whether the support for

which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And, upon this point, the relationship existing between the parties, the length of time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support, and credited for the use and occupation of the land,—in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support, are for the jury. *Munger v. Munger*, 33 N. H. 581; *Seavey v. Seavey*, 37 N. H. 125; *Bundy v. Hyde*, 50 N. H. 116. If these services were rendered, and this support furnished, with no expectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.

In this view, the facts stated in the case will be evidence for the jury to consider upon the trial; but they do not present any question of law upon which the rights of the parties can be determined by the court.

Case discharged.<sup>1</sup>

### *Testamentary Capacity.*

#### MIDDLEDITCH v. WILLIAMS.

45 N. J. EQ. 726.—1889.

THE VICE ORDINARY. The question presented by the appeal in this case is, whether a decree made by the Orphans' Court of Essex

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<sup>1</sup> The liability of an insane person for necessities is more extensive than that of an infant. "That which is necessary for the protection of the person and estate of the lunatic, may well be subject to question and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished in principle from a demand arising in respect of the supply of food and clothing." *Williams v. Wentworth*, 5 Beav. (Eng. Ch.) 325, 329. In *McCormick v. Littler*, 85 Ill. 62, a mower and reaper was held to be a necessary for an insane farmer. In *Kendall v. May*, 10 Allen (Mass.), 59, it was held that one who, at the request of an insane person, not under guardianship, took him for a pleasure trip, can recover his expenses from the insane person, where the jury finds such expenses to be reasonable and proper under the circumstances.

county, on the 4th day of June, 1888, admitting to probate a paper purporting to be the last will of William H. Livingston, deceased, in such a decree as the court should, in view of the facts of the case and the law applicable to them, have made. The paper in question was executed on the 11th day of January, 1887, in the city of New York, where the testator then resided. It appears to have been executed in strict conformity to the requirements of our statute regulating the execution of wills. After the execution of the paper in question, Mr. Livingston removed to the city of Newark, in this state, where he died on the 4th day of February, 1888. His wife died in August, 1886, and after that date, up to the time of his own death, his family consisted of himself, his daughter Lillian (his only surviving child), and his mother-in-law, Marie C. Williams. His daughter, at the time of her mother's death, was five or six years of age.

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The validity of this paper as the will of Mr. William H. Livingston is contested on two grounds: First, it is said, that it is shown to be the product of an insane mind; and, second, that it is shown to be the result of the exercise of undue influence. And it is claimed that the contents of the paper itself furnish strong evidence of the truth of both these objections. A will may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust, nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it.

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The paper in question is, however, assailed on other grounds. It is charged that it is the direct product of an insane delusion. The testator was a believer in spiritualism, that is, he believed the spirits of the dead can communicate with the living, through the agency of persons called mediums, and who possess qualities or gifts not possessed by mankind in general. The proofs show that the testator stated to several persons, prior to the execution of his will, that the spirit of his dead wife had requested him, through a medium residing in Forty-sixth street, in the city of New York, to make provision for his mother-in-law in his will. To one person he said that his wife's spirit had requested him to give all his property to her mother, and to do it in such a way that none of his relatives could get it away from her. To the same person he said, at another time, that the spirit of his wife was constantly urging him to make a will in favor of her mother. To another person he said, that the spirit of



his wife had requested him to be good to her mother, and see that she was made comfortable during the remainder of her life, and he also said that he intended to make a will, leaving enough to his mother-in-law to make her comfortable, because his wife wanted him to do so. The testator's wife, by her will, gave all her property to the testator, subject, however, to an annual payment of \$500 to her mother, and the like sum to her brother, William P. Williams, during their joint lives, and, after the death of either, then to the payment of \$1,000, annually, to the survivor during his or her life. The evidence shows, I think, beyond doubt, that the testator believed, fully and thoroughly, that the messages which were delivered to him, as communications from his wife, actually came from her spirit, and that her spirit knew constantly all that he was doing.

The important question which this branch of the case presents for decision is, was such a belief an insane delusion? The prevailing doctrine in England, up to the time the Court of Queen's Bench decided *Banks v. Goodfellow*, L. R. (5 Q. B.) 549, was, that any degree of mental unsoundness, however slight, and even if it exercised no influence over the testator in making his will, and was wholly unconnected with the disposition he had made of his property, would, nevertheless, be fatal to the validity of his will. The course of reasoning which led to the adoption of this doctrine is stated as follows by Cockburn, C. J., in *Banks v. Goodfellow*, (p. 559): "To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labors under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence."

A different doctrine was established by *Banks v. Goodfellow*. It was there held, that if a testator possesses sufficient mental power to take into account all the considerations necessary to the proper making of a will, though he is subject to some delusion, yet if it appears that such delusion did not influence him, and was not calculated to influence him, in making his will, his will is entitled to be regarded as a valid testamentary act, and should be upheld. The principle established by that case is expressed in the following sentence of Chief Justice Cockburn's opinion (p. 566): "If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in

making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right." All subsequent cases arising in England have been decided according to this principle, and it is now the established law of that country. *Boughton v. Knight*, L. R. (3 Pro. & Div.) 64; *Jenkins v. Morris*, L. R. (14 Ch. Div.) 674; *Smee v. Smee*, L. R. (5 Pro. & Div.) 84. The same principle has, in its substance, been recognized by the Court of Errors and Appeals of this state. Chief Justice Beasley, in pronouncing the judgment of that court in *Lozeau v. Shields*, 8 C. E. Gr. 509, 511, declared that partial insanity was insufficient, of itself, to justify a decree setting aside a sale of real property, or any other act. He said: "Mania does not, *per se*, vitiate any transaction, for the question is, whether such transgression has been affected by it. Where a pure defence of mental incapacity is interposed, I think the true test, in this class of cases, is, whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. This is the rule in the absence of fraud, for fraud, when present, introduces other principles of decision." My own view as to the true rule on this subject may be stated as follows: Even if it appears that a testator was subject to an insane delusion when he made his will, but it is also made to appear that his delusion was not of a character likely to influence him, and did not influence him, in the disposition which he made of his property, his will should be declared valid.

But this is somewhat aside from the question mainly in contest on this branch of the case, namely, is a belief in spiritualism an insane delusion? Sir John Nicholl, in the celebrated case of *Dew v. Clark*, 3 Addams, 79, (2 Eng. Ecc. 441), defined insane delusion as follows:

"Wherever the patient once conceives something extravagant to exist, which has still no existence but in his own heated imagination, and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently reasoned out of that conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of present or absent insanity." Dr. Haggard's report of the opinion pronounced in *Dew v. Clark* attributes somewhat different language to Sir John Nicholl. The following is the definition as he reports it: "When persons believe things to exist

which exist only, or, at least, in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; or, as one of the counsel accurately expressed it, 'It is only the belief of facts which no rational person would have believed, that is insane delusion.' " 1 Wms. Exrs. 35; 1 Redf. Wills, 71. Sir James Hannen, in *Boughton v. Knight*, L. R. (3 Pro. & Div.) 64, 68, adopted the definition as reported in 3 Addams, as the true one. He said he believed it would solve most, if not all the difficulties which could arise in investigations of the kind now under consideration. Chief Judge Denio, in *Seamen's Friend Society v. Hopper*, 33 N. Y. 619, 624, said: "If a person persistently believes supposed facts, which have no real existence, except in the perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense, is insanity." And Cockburn, C. J., in *Banks v. Goodfellow*, L. R. (5 Q. B.) 549, 560, says: "When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound."

According to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to an insane delusion. If, without evidence of any kind, he imagines or conceives something to exist which does not, in fact, exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of some derangement of the mind in which they originate. To illustrate: in *Smee v. Smee*, L. R. (5 Pro. Div.) 84, the testator imagined himself to be the son of George IV, and that when he was born a large sum of money had been put in his father's hands for him, but which his father, in fraud of his rights, had distributed to his brothers; and in *Smith v. Tebbitt*, L. R. (1 Pro. & Div.) 398, the testatrix imagined herself to be one of the persons of the Trinity and her chief legatee to be another. The delusion in both instances, as will be noticed, was indisputably a wild and baseless fancy, not the product of evidence of any kind, but obviously the offspring of a disordered condition of mind. But where a testator is induced, by

false evidence or false statements, to believe a fact to exist which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence; his belief may show want of discernment, that he is overcredulous and easily duped, or that he lacks power to analyze and weigh evidence, or to discriminate between what is true and what is false, but it furnishes no evidence whatever that his mind is diseased. His belief may show lack of judgment or want of reasoning power, but not that his mind is unsound.

The testator's belief in spiritualism was not a morbid fancy, rising spontaneously in his mind, but a conviction produced by evidence. The proofs show that, when he first commenced attending what are called seances, he was inclined to be skeptical; afterwards his mind seemed to be in an unstable condition—he sometimes believed and at others doubted—and that it was not until the spirits gave an extraordinary exhibition of their power, by printing or painting on a pin, worn by his mother-in-law on her neck, in brilliant letters, which sparkled like diamonds, the word “Dickie,” a pet name of his dead wife, that his last doubts as to the reality of the manifestations were removed. Believing, as I do, that these manifestations were correctly described by Vice-Chancellor Giffard, in *Lyon v. Home*, L. R. (6 Eq.) 655, 682, when he called them “mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish and the superstitious; and on the other, to assist the projects of the needy and of the adventurer,” still, it seems to me to be entirely clear, that it cannot be said that a person who does believe in their reality, is, because of such belief, of unsound mind, or subject to an insane delusion. No court has as yet so held. No cases on this subject were cited on the argument. Those which I have examined uniformly hold that a belief in spiritualism is not insanity. The court, in *Robinson v. Adams*, 62 Me. 369, said: “Belief in spiritualism is not insanity, nor an insane delusion. \* \* \* The term ‘delusion,’ as applied to insanity, is not a mere mistake of fact, or the being misled by false testimony or statements to believe that a fact exists which does not exist.” And in *Brown v. Ward*, 53 Md. 376, 393, it was said: “The court cannot say, as a matter of law, that a person is insane because he holds the belief that he can communicate with spirits [of the dead], and can be and is advised and directed by them in his business transactions and the disposition of his property.” Substantially the same view was expressed in *Otto v. Doty*, 61 Iowa, 23, and also in the *Matter of Smith's Will*, 52 Wis. 543. The utmost length to which any court



has as yet gone on this subject is to declare that a belief in spiritualism may justify the setting aside of a will when it is shown that the testator, through fear, dread or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and, in disposing of his property, followed implicitly the directions which he believed the spirit gave him, but, in such case, the will is set aside, not on the ground of insanity, but of undue influence. *Thompson v. Hawks*, 14 Fed. Rep. 902.

There is no evidence in this case which will support a conclusion that the testator, at the time he executed his will, was subject to an insane delusion.

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The question, however, whether or not the paper in question is the will of the testator, must be decided by the evidence before the court. Taking that as the sole guide to the judgment to be pronounced, I think it is the duty of the court to affirm the decree made below.<sup>1</sup>

### *Torts by Insane Persons.*

#### WILLIAMS *v.* HAYS.<sup>2</sup>

143 N. Y. 442 — 1894.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 18, 1892, which affirmed a judgment in favor of defendant entered upon a verdict and affirmed an order denying a motion for a new trial, and also affirmed an order denying a motion for a reargument.

This action was brought by plaintiff, as assignee of the Phoenix Insurance Company, to recover the sum of \$893.89, paid to the firm of Parsons & Loud, as owners of one-sixteenth of a vessel, upon a

<sup>1</sup> The testator "must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them." — DAVIES, J., in *Delafield v. Parish*, 25 N. Y. 9, 29.

<sup>2</sup> After a new trial, this case came again to the Court of Appeals, in 157 N. Y. 541, and it was held that defendant was not liable if his mental irresponsibility was caused by his efforts to save the vessel. A history of this case in the New York courts and an extended critical discussion of it are made the subject of an article by Wm. B. Hornblower on "Insanity and the Law of Negligence," in 5 *Columbia Law Review*, 278.

policy of insurance issued by the Phoenix Insurance Company to said firm.

EARL, J. The defendant and others, among whom were Parsons and Loud, were joint-owners of the brig "Sheldon." By an arrangement between the defendant and the other owners he took the vessel to sail on shares. He was to man the vessel, to pay the crew and to furnish the supplies, and he was to have one-half of her earnings, after certain deductions, for his share, and the other owners were to have the one-half, after certain deductions, for their share. He was to have the absolute control and management of the vessel, and became her owner *pro hac vice*. *Webb v. Pierce*, 1 Curt. 113; *Thorpe v. Hammond*, 12 Wall. 416; *Somes v. White*, 65 Me. 542. The defendant, under the arrangement between him and the other owners in no sense became their agent or servant. In *Webb v. Pierce* it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession, command and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal and agent does not exist between them and the owners. The other cases are to the same effect. The defendant thus became the charterer or lessee of the vessel and was responsible to the other owners for due care in her management, and so the trial judge held.

The case of *Moody v. Buck*, (1 Sand. 304), which holds that one co-owner of a vessel who takes and navigates her for his own benefit, is not liable to his co-owners for her loss by his carelessness, even if correctly decided from the facts there existing, is not applicable to a case like this, where the co-owner takes the vessel not in his right as co-owner for the purpose of using his own, but under an agreement with the other owners whereby he becomes the charterer, lessee or bailee of the vessel, and thus bound to some duty of care and fidelity. There can, however, be no question that that case was incorrectly decided, and the rule laid down therein is not consonant with reason or justice. I cannot find that it has ever been followed as authority in any subsequent case, and it is in conflict with many authorities. *Sheldon v. Skinner*, 4 Wend. 529; *Chesley v. Thompson*, 3 N. H. 9; *Herrin v. Eaton*, 13 Me. 193; *Martin v. Knowllys*, 8 T. R. 145; *Gillot v. Dossat*, 4 Martin (La.), 203; Domat's Civ. Law, § 1489; 1 Parsons on Maritime Law, 95; Ford's Law of Merchant Shipping, 35, 45; Cooley on Torts, 328, 659.

The Sheldon was loaded with ice and started from the coast of Maine for a southern port. She soon encountered storms, and the defendant for more than two days was constantly on duty, and then

becoming exhausted, he went to his cabin, leaving the vessel in charge of the mate and crew. He took a large dose of quinine and laid down. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the captain to come on deck. He refused to believe that the vessel was in any trouble, and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in tow. They cautioned him that his vessel was gradually and certainly drifting upon the shore; and in broad daylight she did drift upon the shore without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Parsons & Loud had insured their interest in the Phoenix Insurance Company, and it paid them the loss. It thus became subrogated to their claim, if any, against the defendant for his negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff. He, standing in the shoes of Parsons & Loud, brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct.

The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked and he found himself in the life-saving station, he was unconscious and knew nothing of what occurred—that, in fact, he was from some cause insane, and, therefore, not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel; but, if insane, was not responsible for her loss through any conduct on his part which in a sane person would have constituted such negligence as would have imposed responsibility.

The important question for us to determine, then, is whether the insanity of the defendant furnishes a defence to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except, perhaps, those in which malice and therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without any reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinions of judges, has been placed upon

several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feasers may not simulate or pretend insanity to defend their wrongful acts causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others.

In Buswell on Insanity (sec. 355), it is said: "Since in a civil action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law that although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit."

In Cooley on Torts (98), the learned author says: "A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore, the law in giving redress has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. \* \* \* There is, consequently, no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case, 'the reason is because he that is damaged ought to be recompensed.' " And at page 100 he says: "Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy, and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in



calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

In *Shearman and Redfield on Negligence* (sec. 57), it is said: "Infants and persons of unsound mind are liable for injuries caused by their tortious negligence; and, so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation."

In *Reeves' Domestic Relations* (386), it is said: "Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries, with force, the intention is not regarded; for in such case a lunatic is as liable to compensate in damages as a man in his right mind."

The doctrine of these authorities is illustrated in many interesting cases. *Bullock v. Babcock*, 3 Wend. 391; *Hartfield v. Roper*, 21 Id. 615; *Krom v. Schoonmaker*, 3 Barb. 647; *Conklin v. Thompson*, 29 Id. 218; *Cross v. Kent*, 32 Md. 581; *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. 230; *Brown v. Howe*, 9 Gray, 84; *Morain v. Devlin*, 132 Mass. 87; *Beales v. See*, 10 Penn. St. 56; *Humphrey v. Douglass*, 10 Vt. 71; *Morse v. Crawford*, 17 Id. 499; *Cross v. Andrews*, Croke, Elizabeth, 622; *Jennings v. Rundall*, 8 T. R. 336.

In *Bullock v. Babcock*, Judge Marcy, writing in a case where an infant twelve years old was held liable for putting out one of the eyes of another infant, said: "The liability to answer in damages for trespass does not depend upon the mind or capacity of the actor; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them."

In *Krum v. Schoonmaker* it was held that a lunatic may be sued for an injury done to another, because the intent with which the act was done is not material. There the action was against a justice of the peace for false imprisonment for issuing a warrant without any complaint, by virtue of which the plaintiff was arrested.

In *Cross v. Kent* it was held that a lunatic or insane person, though not punishable criminally, is liable to a civil action for any tort he may commit; that in an action against a party for setting fire to and burning a barn, neither evidence of his lunacy nor that the burning was the result of accident, is admissible in mitigation of compensatory damages.

In *Neal v. Gillett*, in an action on the case for damages caused by the negligence of the defendants, who were severally of the ages of

thirteen and sixteen at the time of the injury, it was held that where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration in determining the question of their negligence.

In *Huchting v. Engel* it was held that an infant, though under seven years of age, was liable in an action of trespass for breaking and entering the plaintiff's premises and breaking down and destroying his shrubbery and flowers.

In *Karow v. The Continental Insurance Company*, it is said in the opinion: "While the burning of his own property by an assured under no restraint of duty and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice Gibson, 'on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.' "

In *Brown v. Howe* an insane person carelessly set fire to the dwelling-house of his guardian, and while it was held that the guardian could not be allowed the amount of his damages in his probate account, it was held that his only course was to sue the administrator of the lunatic, who had died, in a court of law, and have a judgment fixing his damages, and collect it from the assets, if the estate was solvent; if not, to share with the other creditors.

In *Morain v. Devlin*, it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he is the owner, and of which his guardian has the care and management.

In *Beales v. See*, it was said by Gibson, C. J.: "As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it."

In *Morse v. Crawford*, in an action for tort, it was held that the fact that the defendant was insane at the time of committing the injury was no defence to the action, and that if the action be for destroying property intrusted to the defendant, it is no defence that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. In the opinion of the Court it is said: "It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one

receives an injury from the act of another, this is a trespass, though done by mistake or without design. Consequently no reason can be assigned why a lunatic should not be held liable."

In *Jennings v. Rundall*, Lord Chief Justice Kenyon said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." Lawrence, J., also writing in that case, mentioned the distinction between negligence and an act done by an infant; and he held that the same rule would have to be applied if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, as would be applied if the declaration charged the infant with having given the cattle bad food by which they died.

There can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance — between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts, was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a willful tort.

I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant — not as agent — but as to the other owners as charterer, lessee, or bailee, and if he caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel.

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging, his efforts to save the vessel were tireless and unceasing, and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion.

If it could be held that the obligation of the defendant to take

due care of the vessel while she was in his possession, under his contract with the other owners, was an obligation springing out of his contract, and thus a contract obligation, such a view of the case would not aid him. He was sane when he entered into the contract, and his subsequent insanity would furnish no defence to an action for a breach of the contract. *Oakley v. Martin*, 11 N. Y. 625; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 Id. 487; *Evans v. United States Life Insurance Co.*, 64 Id. 304; *Spalding v. Rosa*, 71 Id. 40.

If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness. They did nothing whatever to save the vessel. They did not even expostulate with him or tender him any advice or a word of caution, and yet the mate saw what the captains of the tugs saw at a distance, that something was the matter with him. It is difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was willfully wrecking her. We leave the effect of their conduct upon the defendant's liability to be determined, if it should become necessary, upon the new trial, simply saying that the question is worthy of careful consideration, whether the defendant can allege his own incompetency, and at the same time claim that for any reason the mate ought not to have taken control of the vessel.

The case of *Hays v. Phoenix Insurance Co.* (25 J. & S. 199; aff., 127 N. Y. 656), which seems to have controlled the decision below, is not an authority for the defendant. There he brought an action against the insurance company to recover the amount of his insurance upon this vessel, and his mere carelessness, whether sane or insane, was no defence to such an action. It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants. The liability of the insured to respond in damages for the loss or destruction of the property of another owner stands upon different principles. *Liverpool S. Co. v. Phoenix Insurance Co.*, 129 U. S. 438; *Karow v. Continental Insurance Co.*, 57 Wis. 56.

Since writing the above, suggestions have been made by some of my brethren which should receive some attention.



The fact that the defendant was a part owner of the vessel can play no part in this discussion. He did not take the vessel as part owner, but under the contract with the other owners; and as to them, his duties and obligations were such as spring from the relation created by that contract. Further, he was the minority part owner, and the others were the majority part owners, and, as such, had the legal right and the power to control the vessel against his will. *Ward v. Ruckman*, 36 N. Y. 36; *Gould v. Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. 406; *McLochlin's Merchant Shipping*, 89. In *Ward v. Ruckman* it was held that the majority owners of a vessel have the right to displace the master at their pleasure, though he be in possession as part owner. In making their contract with the defendant, the other part owners were exercising their right as the majority part owners. *Non constat*, but that they would, except for the contract, have displaced the defendant and appointed some other person master of the vessel. Therefore, as I have before said, he must be treated as the charterer, lessee or bailee of the vessel.

I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: Such care as a reasonably careful and prudent owner would ordinarily give to his own vessel. Such is the standard of care set up for all bailees of personal property for hire. But what is that standard? It is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent can give. Such a man is not the jural man of ordinary prudence, and he does not furnish the standard. The standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence. The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence yet the law takes no account of that, but requires that he should come up to the standard and his duty be measured thereby.

So when we have defined, as above, the duty of care resting upon the defendant, we have made no progress in the solution of the question here involved, for it is conceded that he took no care whatever. It is sought, however, to excuse him because he was insane and incapable of care; and the question, and, in the end, the sole question, for us to determine, is whether that excuse is a good one; and I have heard no argument to sustain it. It is unquestioned that an insane person is civilly liable for his active torts; and is there then any reason for saying that he is not liable for his negligent torts?

To uphold this judgment, we must engraft upon the general rule the exception or qualification that he is not liable for his negligent torts. If the defendant had taken a torch and fired the vessel, he would have been liable for her destruction, although his act was unconscious and accompanied by no free will. But if he had negligently fired the vessel and thus destroyed her, being incapable from his mental infirmity from exercising any care, the claim must be that he would not be liable. Such a distinction is not hinted at in any authority, has no foundation whatever in principle or reason, and cannot stand with authorities I have before cited.

My conclusion, therefore, is that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except PECKHAM, GRAY and O'BRIEN, JJ., dissenting.  
Judgment reversed.<sup>1</sup>

### *Crimes by Insane Persons.*

#### PARSONS v. STATE.

81 ALA. 577.—1886.

SOMERVILLE, J. In this case the defendants have been convicted of the murder of Bennett Parsons, by shooting him with a gun, one of the defendants being the wife and the other the daughter of the deceased. The defence set up in the trial was the plea of insanity, the evidence tending to show that the daughter was an idiot, and the mother and wife a lunatic, subject to insane delusions, and that the killing on her part was the offspring and product of those delusions.

The rulings of the court raise some questions of no less difficulty

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<sup>1</sup> "Under the general issue of slander, the insanity of the defendant at the time of speaking the words may be given in evidence. The proof will be received in excuse or in mitigation of damages, according to the circumstances of the case. *Dickinson v. Barber*, 9 Mass. 225. And it may be, that partial mental derangement on the subject to which the words relate, may also be given in evidence under the general issue. *Horner v. Marshall's Adm'x*, 5 Munf. 466." —SULLIVAN, J., in *Yeates v. Reed*, 4 Blackf. 463, 465.

"The court observed that they gave no opinion, in this case, how far, or to what degree, insanity was to be received as an excuse in an action for defamatory words. Where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred. But where the degree of insanity was slight, or not uniform, the slander might have its effect; and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly."—*Dickinson v. Barber*, 9 Mass. 225, 227.

than of interest, for, as observed by a distinguished American judge, "of all medico-legal questions, those connected with insanity are the most difficult and perplexing." Per Dillon, C. J., in *State v. Felter*, 35 Iowa, 67. It has become of late a matter of comment among intelligent men, including the most advanced thinkers in the medical and legal professions, that the deliverances of the law courts on this branch of our jurisprudence have not heretofore been at all satisfactory, either in the soundness of their theories, or in their practical application. The earlier English decisions, striving to establish rules and tests on the subject, including alike the legal rules of criminal and civil responsibility, and the supposed tests of the existence of the disease of insanity itself, are now admitted to have been deplorably erroneous, and, to say nothing of their vacillating character, have long since been abandoned. The views of the ablest of the old text-writers and sages of the law were equally confused and uncertain in the treatment of these subjects, and they are now entirely exploded. Time was in the history of our laws that the veriest lunatic was debarred from pleading his providential affliction as a defence to his contracts. It was said, in justification of so absurd a rule, that no one could be permitted to stultify himself by pleading his own disability. So great a jurist as Lord Coke, in his attempted classification of madmen, laid down the legal rule of criminal responsibility to be that one should "wholly have lost his memory and understanding;" as to which Mr. Erskine, when defending Hadfield for shooting the king, in the year 1800, justly observed: "No such madman ever existed in the world." After this great and historical case, the existence of delusion promised for awhile to become the sole test of insanity, and acting under the duress of such delusion, was recognized in effect as the legal rule of responsibility. Lord Kenyon, after ordering a verdict of acquittal in that case, declared with emphasis that there was "no doubt on earth" the law was correctly stated in the argument of counsel. But, as it was soon discovered that insanity often existed without delusions, as well as delusions without insanity, this view was also abandoned. Lord Hale has before declared that the rule of responsibility was measured by the mental capacity possessed by a child fourteen years of age, and Mr. Justice Tracy, and other judges had ventured to decide that, to be non-punishable for alleged acts of crime, "a man must be totally deprived of his understanding and memory, so as not to know what he was doing — no more than an infant, a brute, or a wild beast.— *Arnold's Case*, 16 How. St. Tr. 764. All these rules have necessarily been discarded in modern times in the light of the new scientific knowledge acquired by a more thorough

study of the disease of insanity. In *Bellingham's Case*, decided in 1812, by Lord [Sir James] Mansfield at the Old Bailey, (Coll. on Lun. 630), the test was held to consist in a knowledge that murder, the crime there committed, was "against the laws of God and nature," thus meaning an ability to distinguish between right and wrong in the abstract. This rule was not adhered to, but seems to have been modified so as to make the test rather a knowledge of right and wrong as applied to the particular act.—Lawson on Insanity, 231, sec. 7 *et seq.* The great leading case on this point in England is *McVaghten's Case*, decided in 1843, before the English House of Lords, 10 Cl. & F. 200; s. c. 2 Lawson's Cr. Def. 150. It was decided by the judges in that case, that, in order to entitle the accused to acquittal, it must be clearly proved that, at the time of committing the offence, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did, not to know that what he was doing was wrong. This rule is commonly supposed to have heretofore been adopted by this court, and has been followed by the general current of American adjudications. *Boswell v. The State*, 63 Ala. 307; s. c., 35 Amer. Rep. 20; s. c., 2 Lawson's Cr. Def. 352; *McAllister v. State*, 17 Ala. 434; Lawson on Insanity, 219-221, 231.

In view of these conflicting decisions, and of the new light thrown on the disease of insanity by the discoveries of modern psychological medicine, the courts of the country may well hesitate before blindly following in the unsteady footsteps found upon the old sandstones of our common law jurisprudence a century ago. The trial court, with prudent propriety, followed the previous decisions of this court, the correctness of which, as to this subject, we are now requested to review.

We do not hesitate to say that we re-open the discussion of this subject with no little reluctance, having long hesitated to disturb our past decisions on this branch of the law. Nothing could induce us to do so except an imperious sense of duty, which has been excited by a protracted investigation and study, impressing our minds with the conviction that the law of insanity, as declared by the courts on many points, and especially the rule of criminal accountability, and the assumed tests of disease, to that extent which confers legal irresponsibility, have not kept pace with the progress of thought and discovery, in the present advanced stages of medical science. Though science has led the way, the courts of England have declined to follow, as shown by their adherence to the rulings in *McVaghten's Case*, emphasized by the strange declaration made by the Lord Chancellor of England, in the House of Lords,



on so late a day as March 11, 1862, that "the introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle of considering insanity as a disease."

It is not surprising that this state of affairs has elicited from a learned law writer, who treats of this subject, the humiliating declaration, that, under the influence of these ancient theories, "the memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane, have been executed as criminals." 1 Bish. Cr. Law (7th ed.), sec. 390. There is good reason, both for this fact, and for the existence of unsatisfactory rules on this subject. In what we say we do not intend to give countenance to acquittals of criminals, frequent examples of which have been witnessed in modern times, based on the doctrine of moral or emotional insanity, unconnected with mental disease, which is not yet sufficiently supported by psychology, or recognized by law as an excuse for crime. *Boswell's Case, supra*; 1 Whar. Cr. Law (9th ed.), sec. 43.

In ancient times, lunatics were not regarded as "unfortunate sufferers from disease, but rather as subjects of demoniacal possession, or as self-made victims of evil passions." They were not cared for humanely in asylums and hospitals, but were incarcerated in jails, punished with chains and stripes, and often sentenced to death by burning or the gibbet. When put on their trial, the issue before the court then was not as now. If acquitted, they could only be turned loose on the community to repeat their crimes without molestation or restraint. They could not be committed to hospitals, as at the present day, to be kept in custody, cared for by medical attention, and often cured. It was not until the beginning of the present century that the progress of Christian civilization asserted itself by the exposure of the then existing barbarities, and that the outcry of philanthropists succeeded in eliciting an investigation of the British parliament looking to their suppression. Up to that period the medical treatment of the insane is known to have been conducted upon a basis of ignorance, inhumanity, and empiricism. Amer. Cyclop., vol. 9 (1874), *title*, Insanity. Being punished for wickedness, rather than treated for disease, this is not surprising. The exposure of these evils not only led to the establishment of that most beneficent of modern civilized charities—the hospital and asylum for the insane—but also furnished hitherto unequalled opportunities to the medical profession of investigating and treating insanity on the pathological basis of its being a disease of the mind. Under these new and more favorable conditions the medical

jurisprudence of insanity has assumed an entirely new phase. The nature and exciting causes of the disease have been thoroughly studied and more fully comprehended. The result is that the "right and wrong test," as it is sometimes called, which, it must be remembered, itself originated with the medical profession, in the mere dawn of the scientific knowledge of insanity, has been condemned by the great current of modern medical authorities, who believe it to be "founded on an ignorant and imperfect view of the disease." Encyc. Brit. vol. 15 (9th ed.), title, Insanity.

The question then presented seems to be, whether an old rule of legal responsibility shall be adhered to, based on theories of physicians promulgated a hundred years ago, which refuse to recognize any evidence of insanity, except the single test of mental capacity to distinguish right and wrong — or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine, now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common-law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the laws of the Medes and Persians, which could not be changed. In establishing any new rule, we should strive, however, to have proper regard for two opposite aspects of the subject, lest, in the words of Lord Hale, "on one side, there be a kind of inhumanity towards the defects of human nature; or, on the other, too great indulgence to great crimes."

It is everywhere admitted, and as to this there can be no doubt, that an idiot, lunatic, or other person of diseased mind, who is afflicted to such extent as not to know whether he is doing right or wrong, is not punishable for any act which he may do while in that state.

Can the courts justly say, however, that the only test or rule of responsibility in criminal cases is the power to distinguish right from wrong, whether in the abstract, or as applied to the particular case? Or may there not be insane persons, of a diseased brain, who, while capable of perceiving the difference between right and wrong, are, as matter of fact, so far under the duress of such disease as to

destroy the power to choose between right and wrong? Will the courts assume as a fact, not to be rebutted by any amount of evidence, or any new discoveries of medical science, that there is, and can be no such state of the mind as that described by a writer on psychological medicine as one "in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former nor abstain from the latter?" Dean's Med. Jur. 497.

Much confusion can be avoided in the discussion of this subject by separating the duty of the jury from that of the court in the trial of a case of this character. The province of the jury is to determine facts; that of the court to state the law. The rule in *McNaghten's Case* arrogates to the court, in legal effect, the right to assert, as matter of law, the following propositions:

(1). That there is but a single test of the existence of that degree of insanity, such as confers irresponsibility for crime.

(2). That there does not exist any case of such insanity in which that single test — the capacity to distinguish right from wrong — does not appear.

(3). That all other evidences of alleged insanity, supposed by physicians and experts to indicate a destruction of the freedom of the human will, and the irresistible duress of one's actions, do not destroy his mental capacity to entertain a criminal intent.

The whole difficulty, as justly said by the Supreme Judicial Court of New Hampshire, is, that "courts have undertaken to declare that to be law which is matter of fact." "If," observes the same court, "the tests on insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness, and showing himself to be qualified to testify as an expert." *State v. Pike*, 49 N. H. 399.

We first consider what is the proper legal rule of responsibility in criminal cases.

No one can deny that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) Capacity of intellectual discrimination; and (2) freedom of will. Mr. Wharton, after recognizing this fundamental and obvious principle, observes: "If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to refrain from doing the act, there is no responsibility." 1 Whar. Cr. Law (9th ed.), sec. 33. Says Mr. Bishop, in discussing this subject: "There cannot be, and there is

not, in any locality, or age, a law punishing men for what they cannot avoid." 1 Bish. Cr. Law (7th ed.) sec. 383b.

If, therefore, it be true, as matter of fact, that the disease of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to choose between the right and wrong, although he perceive it — by which we mean the power of volition to adhere in action to the right and abstain from the wrong — is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not, and such we believe to be the just, reasonable and humane rule, towards which all the modern authorities in this country, legislation in England, and the laws of other civilized countries of the world, are gradually, but surely tending, as we shall further on attempt more fully to show.

We next consider the question as to the *probable existence of such a disease*, and the *test of its presence* in a given case.

It will not do for the courts to dogmatically deny the possible existence of such a disease, or its pathological and psychical effects, because this is a matter of evidence, not of law, or judicial cognizance. Its existence, and effect on the mind and conduct of the patient, is a question of fact to be proved, just as much as the possible existence of cholera or yellow fever formerly was before these diseases became the subjects of common knowledge, or the effects of delirium from fever, or intoxication from opium and alcoholic stimulants would be. The courts could, with just as much propriety, years ago, have denied the existence of the Copernican system of the universe, the efficacy of steam and electricity as a motive power, or the possibility of communication in a few moments between the continents of Europe and America by the magnetic telegraph, or that of the instantaneous transmission of the human voice from one distant city to another by the use of the telephone. These are scientific facts, first discovered by experts before becoming matters of common knowledge. So, in like manner, must be every other unknown scientific fact in whatever profession or department of knowledge. The existence of such a cerebral disease as that which we have described, is earnestly alleged by the superintendents of insane hospitals and other experts, who constantly have experimental dealings with the insane, and they are permitted every day to so testify before juries. The truth of their testimony — or what is the same thing, the existence or non-existence of such a disease of the mind — in each particular case, is necessarily a matter for the determination of the jury from the evidence.



So it is equally obvious that the courts cannot, upon any sound principle, undertake to say what are the invariable or infallible tests of such disease. The attempt has been repeatedly made, and has proved a confessed failure in practice. "Such a test," says Mr. Bishop, "has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist." 1 Bish. Cr. Law (7th ed.) sec. 381. In this conclusion, Dr. Ray, in his learned work on the Medical Jurisprudence of Insanity, fully concurs. Ray's Med. Jur. Ins. p. 39. The symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be just alike. "The fact of its existence," says Dr. Ray, "is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case." Ray's Med. Jur. of Ins. sec. 24. Its exciting causes being moral, psychical, and physical, are the especial subjects of specialists' study. What effect may be exerted on the given patient by age, sex, occupation, the seasons, personal surroundings, hereditary transmission, and other causes, is the subject of evidence based on investigation, diagnosis, observation and experiment. Peculiar opportunities, never before enjoyed in the history of our race, are offered in the present age for the ascertainment of these facts, by the establishment of asylums for the custody and treatment of the insane, which Christian benevolence and statesmanship have substituted for jails and gibbets. The testimony of these experts — differ as they may in many doubtful cases — would seem to be the best which can be obtained, however unsatisfactory it may be in some respects.

In the present state of our law, under the rule in *McNaghten's Case*, we are confronted with this practical difficulty, which itself demonstrates the defects of the rule. The courts in effect charge the juries, as matter of law, that no such mental disease exists as that often testified to by medical writers, superintendents of insane hospitals, and other experts — that there can be, as matter of scientific fact, no cerebral defect, congenital or acquired, which destroys the patient's power of self control — his liberty of will and action — provided only he retains a mental consciousness of right and wrong. The experts are immediately put under oath, and tell the juries just the contrary, as matter of evidence; asserting that no one of ordinary intelligence can spend an hour in the wards of an insane asylum without discovering such cases, and, in fact, that "the whole management of such asylums presupposes a knowledge of right and wrong on the part of the inmates." Guy & F. on Forensic Med. 220. The result in practice, we repeat, is, that the courts charge

one way, and the jury, following an alleged higher law of humanity, find another, in harmony with the evidence.

In Bucknill on Criminal Lunacy, p. 59, it is asserted as "the result of observation and experience, that in all lunatics, and in the most degraded idiots, whenever manifestations of any mental action can be educed, the feeling of right and wrong may be proved to exist."

"With regard to this test," says Dr. Russel Reynolds, in his work on "The Scientific Value of the Legal Tests of Insanity," p. 34 (London, 1872), "I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of nature."

In the learned treatise of Drs. Bucknill and Tuke on "Psychological Medicine," p. 269 (4th ed, London, 1879), the legal tests of responsibility are discussed, and the adherence of the courts to the right and wrong test is deplored as unfortunate, the true principle being stated to be "whether, in consequence of congenital defect or acquired disease, the power of self-control is absent altogether, or is so far wanting as to render the individual irresponsible." It is observed by the authors: "As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness, through cerebral defect or disease, to do right is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows."

Dr. Peter Bryce, Superintendent of the Alabama Insane Hospital for more than a quarter century past, alluding to the moral and disciplinary treatment to which the insane inmates are subjected, observes: "They are dealt with in this institution, as far as it is practicable to do so, as rational beings; and it seldom happens that we meet with an insane person who cannot be made to discern, to some feeble extent, his duties to himself and others, and his true relations to society." Sixteenth Annual Rep. Ala. Insane Hosp. (1876), p. 22; Biennial Rep. (1886), pp. 12-18.

Other distinguished writers on the medical jurisprudence of insanity have expressed like views, with comparative unanimity. And nowhere do we find the rule more emphatically condemned than by those who have the practical care and treatment of the insane in the various lunatic asylums of every civilized country. A notable instance is found in the following resolution unanimously passed at the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held in London, July 14, 1864, where there were present fifty-four medical officers:

"Resolved, That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent,

because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions." *Judicial Aspects of Ins.* (Ordronaux, 1877), 423-424.

These testimonials as to a scientific fact are recognized by intelligent men in the affairs of every day business, and are constantly acted on by juries. They cannot be silently ignored by judges. Whether established or not, there is certainly respectable evidence tending to establish it, and this is all the courts can require.

Nor are the modern law writers silent in their disapproval of the alleged test under discussion. It meets with the criticism or condemnation of the most respectable and advanced in thought among them, the tendency being to incorporate in the legal rule of responsibility "not only the knowledge of good and evil, but the power to choose the one, and refrain from the other." *Browne's Med. Jur. of Insanity*, sec. 13 *et seq.*, sec. 18; *Ray's Med. Jur.* sec. 16-19; *Whart. & Stillé's Med. Jur.* sec. 59; 1 *Whart. Cr. Law* (9th ed.), secs. 33, 43, 45; 1 *Bish. Cr. Law* (7th ed.), sec. 386 *et seq.*; *Judicial Aspects of Insanity* (Ordronaux), 419; 1 *Greenl. Ev.* sec. 372; 1 *Steph. Hist. Cr. Law*, sec. 168; *Amer. Law Rev.* vol. 4 (1869-70), 236 *et seq.*

The following practical suggestion is made in the able treatise of Balfour Browne above alluded to: "In a case of alleged insanity, then," he says, "if the individual suffering from enfeeblement of intellect, delusion, or any other form of mental aberration, was looked upon as, to the extent of this delusion, under the influence of duress (the dire duress of disease), and in so far incapacitated to choose the good and eschew the evil, in so far, it seems to us," he continues, "would the requirements of the law be fulfilled; and in that way it would afford an opening, by the evidence of experts, for the proof of the amount of self-duress in each individual case, and thus alone can the criterion of law and the criterion of the inductive science of medical psychology be made to coincide." *Med. Jur. of Ins.* (Browne), sec. 18.

This, in our judgment, is the practical solution of the difficulty before us, as it preserves to the courts and the juries, respectively, a harmonious field for the full assertion of their time-honored functions.

So great, it may be added, are the embarrassments growing out of the old rule, as expounded by the judges in the House of English Lords, that, in March, 1874, a bill was brought before the House of

Commons, supposed to have been drafted by the learned counsel for the Queen, Mr. Fitzjames Stephen, which introduced into the old rule the new element of an absence of the power of self-control, produced by diseases affecting the mind, and this proposed alteration of the law was cordially recommended by the late Chief Justice Cockburn, his only objection being that the principle was proposed to be limited to the case of homicide. 1 Whart. Cr. Law, (9th ed.), sec. 45, p. 66, note 1; Browne's Med. Jur. of Insan., sec. 10, note 1.

There are many well considered cases which support these views.

[*Here follows a discussion of the following cases: Case of Hadfield, 27 How. St. Tr. 1282; U. S. v. Lawrence, 4 Cr. C. C. Rep. 518; U. S. v. Guiteau, 10 Fed. Rep. 161; Rex v. Oxford, 2 C. & P. 225; State v. Felter, 35 Iowa, 68; Hopps v. People, 31 Ill. 385; Bradley v. State, 31 Ind. 492; Harris v. State, 18 Tex. Ct. App. 287; State v. Pike, 49 N. H. 399; State v. Jones, 50 N. H. 369.*]

Numerous other cases could be cited bearing on this particular phase of the law, and supporting the above views with more or less clearness of statement. That some of these cases adopt the extreme view, and recognize moral insanity as a defence to crime, and others adopt a measure of proof for the establishment of insanity more liberal to the defendant than our own rule, can neither lessen their weight as authority, nor destroy the force of their logic. Many of them go further on each of these points than this court has done, and are, therefore, stronger authorities than they would otherwise be in the support of our views. *Kriel v. Com.*, 5 Bush. (Ky.) 362; *Smith v. Com.*, 1 Duv. (Ky.) 224; *Dejarnette v. Com.*, 75 Va. 867; *Coyle v. Com.*, 100 Pa. St. 573; *Cunningham v. State*, 56 Miss. 269; *Com. v. Rogers*, 7 Metc. 500; *State v. Johnson*, 40 Conn. 136; *Anderson v. State*, 43 Conn. 514, 525; Buswell on Ins. sec. 439 *et seq.*; *State v. McWhorter*, 46 Iowa, 88.

The law of Scotland is in accord with the English law on this subject, as might well be expected. The Criminal Code of Germany, however, contains the following provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country: "There is no criminal act when the actor at the time of the offence is in a state of unconsciousness, or morbid disturbance of the mind, through which the free determination of his will is excluded." Ency. Brit. (9th ed.), vol. 9, p. 112; citing Crim. Code of Germany (sec. 51, R. G. B.)

The Code of France provides: "There can be no crime or offence if the accused was in a state of madness at the time of the act." For some time the French tribunals were inclined to interpret this law in such a manner as to follow in substance the law of England.



But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country.

It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in *McNaghten's Case*, *supra*, is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself. The practical trouble is for the courts to determine in what particular cases the party on trial is to be transferred from the category of sane to that of insane criminals — where, in other words, the border line of punishability is adjudged to be passed. But, as has been said in reference to an every-day fact of nature, no one can say where twilight ends or begins, but there is ample distinction, nevertheless, between day and night. We think we can safely rely in this matter upon the intelligence of our juries, guided by the testimony of men who have practically made a study of the disease of insanity; and enlightened by a conscientious desire, on the one hand, to enforce the criminal laws of the land, and on the other, not to deal harshly with any unfortunate victim of a diseased mind, acting without the light of reason, or the power of volition.

Several rulings of the court, including especially the one given *ex mero motu*, and the one numbered five, were in conflict with this view, and for these errors the judgment must be reversed. The charges requested by defendant were all objectionable on various grounds. Some of them were imperfect statements of the rules above announced; some were argumentative, and others were misleading by reason of ignoring one or more of the essentials of criminal irresponsibility, as explained in the foregoing opinion.

It is almost needless to add that where one does not act under the duress of a diseased mind, or insane delusion, but from motives of anger, revenge or other passion, he cannot claim to be shielded from punishment for crime on the ground of insanity. Insanity proper, is more or less a mental derangement, coexisting often, it is true, with a disturbance of the emotions, affections and other moral powers. A mere moral, or emotional insanity, so-called, unconnected with disease of the mind, or irresistible impulse resulting from mere moral obliquity, or wicked propensities and habits, is not recognized as a defence to crime in our courts. 1 Whar. Cr. Law (9th ed.), sec. 46; *Boswell v. State*, 63 Ala. 307, 35 Amer. Rep. 20; *Ford v. State*, 71 Ala. 385.

The charges refused by the court raise the question as to how far one acting under the influence of an insane delusion is to be exempted from criminal accountability. The evidence tended to show that one of the defendants, Mrs. Nancy J. Parsons, acted under the

influence of an insane delusion that the deceased, whom she assisted in killing, possessed supernatural power to afflict her with disease and to take her life by some "supernatural trick;" that by means of such power the deceased had caused defendant to be in bad health for a long time, and that she acted under the belief that she was in great danger of the loss of her life from the conduct of deceased operating by means of such supernatural power.

The rule in *McNaghten's Case*, as decided by the English judges, and supposed to have been adopted by the court, is that the defence of insane delusion can be allowed to prevail in a criminal case only when the imaginary state of facts would, if real, justify or excuse the act; or, in the language of the English judges themselves, the defendant "must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real." *Boswell's Case*, 63 Ala. 307. It is apparent, from what we have said, that this rule cannot be correct, as applied to all cases of this nature, even limiting it, as done by the English judges, to cases where one "labors under partial delusion, and is not in other respects insane." *McNaghten's Case*, 10 Cl. & P. 200; s. c., 2 Lawson's Cr. Def. 150. It holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion, operating upon a human mind, the integrity of which is destroyed or impaired by disease, except, perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence. Field's Med. Leg. Guide, 101-104; Guy & F. on Forensic Med. 220. If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be, where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life or limb. The personal fear, or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act, or demonstration on the part of the latter, such as, if the imaginary facts were real, would, under like circumstances, have justified a man perfectly sane in shooting or killing. If he dare fail to reason, on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow also, under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man

would be if, perchance, it was by his fault the difficulty was provoked, whether by word or deed; or, if, in fine, he may have been so negligent as not to have declined combat when he could do so safely, without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be a little less than inhumane, and its strict enforcement would probably transfer a large percentage of the inmates of our Insane Hospital from that institution to hard labor in the mines or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion, proceeding from a diseased brain, can so destroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong. This inquiry, as we have said, and here repeat, is a question of fact for the determination of the jury in each particular case. It is not a matter of law to be decided by the courts. We think it sufficient if the insane delusion — by which we mean the delusion proceeding from a diseased mind — sincerely exists at the time of committing the alleged crime, and the defendant, believing it to be real, is so influenced by it as either to render him incapable of perceiving the true nature and quality of the act done, by reason of the depravation of the reasoning faculty, or so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of the duress of the disease. In such a case, in other words, there must exist either one of two conditions: (1) Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular act; or (2) the overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain. *Rex v. Hadfield*, 37 How. St. Tr. 1282, s. c., 2 Lawson's Cr. Def. 201; *Roberts v. State*, 3 Ga. 310; *Com. v. Rogers*, 7 Metc. 500; *State v. Windsor*, 5 Harr. 512; Buswell on Insan. secs. 434 and 440; Amer. Law Review, vol. 4 (1869-70), pp. 236, 252.

In conclusion of this branch of the subject, that we may not be misunderstood, we think it follows very clearly, from what we have said, that the inquiries to be submitted to the jury, then, in every criminal trial where the defence of insanity is interposed, are these:

1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a disease of the mind, so as to be either idiotic, or otherwise insane?
2. If such be the case, did he know right from wrong as applied

to the particular act in question? If he did not have such knowledge, he is not legally responsible.

3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

(1). If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.

(2). And if, at the time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

The rule announced in *Boswell's Case*, 63 Ala. 308, *supra*, as stated in the fourth head note, is in conflict with the foregoing conclusions, and to that extent is declared incorrect, and is not supported by the opinion in that case otherwise than by *dictum*.

We adhere, however, to the rule declared by this court in *Boswell's Case*, *supra*, and followed in *Ford's Case*, 71 Ala. 385, holding that when insanity is set up as a defence in a criminal case, it must be established to the satisfaction of the jury, by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.

\* \* \* \* \*

The judgment is reversed and the cause remanded. In the meanwhile the prisoners will be held in custody until discharged by due process of law.

STONE, C. J., dissents, in part.

\* \* \* \* \*

I summarize my views of the question I propose to discuss, in the following brief paragraphs:

1. Insanity when relied on as a defence to a prosecution for crime, is a mixed question of law and fact.

2. It is a perfect defence to an accusation of crime, if the accused, at the time he committed the act, was afflicted with a mental disease to such extent, as to render him incapable of determining between right and wrong, or of perceiving the true nature and quality of the act done.

3. When it is satisfactorily shown that the accused was mentally diseased at the time he did the act, charged as an offence, and that he did the act in consequence solely of such mental disease, without which it would not have been done, this is a complete defence, even though the defendant knew the act was wrong.

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<sup>1</sup> The dissenting opinion is equally exhaustive; but the extracts given will show its general tenor and its conclusions.



4. When at the time of committing the act charged, the defendant was laboring under a disease of the mind, known as delusion, illusion, or hallucination, and the act done was solely the result of such mental disease, connected with and growing out of it as effect follows cause, and without which the act would not have been done, the defendant should be acquitted on the plea of insanity. Whar. Cr. Ev., sec. 336; 2 Greenl. Ev., sec. 372.

5. No form of moral or emotional insanity is a defence against a criminal accusation.

I have considered the very able opinion of my brother Somerville with great care, and I differ from what I understand to be its declared principles only to a limited extent, to be commented upon further on. I have also read the legal authorities he relies on, but have not read, on this subject, the other authorities he refers to. Some of them, I fear, deal too much in the abstruse and metaphysical — refine too much — to become safe guides in judicial administration. Legal principles, when enunciated for the government of juries, should, if possible, be expressed so simply and clearly as to be easily understood by the class of men who generally perform that service. Less than this is not properly instructing juries on questions of law, pertinent to the issues they are sworn to try.

I differ with my brother Somerville in the interpretation of some of the legal authorities he relies on as supporting his views, and, as to others, in the estimate he places upon them as authority. This court has repudiated the doctrine of moral insanity as a defence for conduct otherwise criminal; and we hold that insanity is a defence to be affirmatively establish by proof.

\* \* \* \* \*

I regret the necessity I have felt resting on me of differing with my brothers in this case. I regret what I conceived to be a duty to express my views so much at length. On a question of less importance I would not have done so. I have feared, however, and still fear, that the effect of their ruling will be to let in many of the evils which result from allowing the defence of emotional insanity. I acquit them of all intention to alter the rule of this court on that subject. Still, I think the line cannot be too clearly and sharply drawn which separates the pitiable, unfortunate victim of diseased mental faculties from the recklessly depraved, whose chief evidence of insanity is found in the causeless atrocity of their crimes. Human life has become all too cheap; and while we spread the mantle of mercy over the criminally irresponsible, the lawless should be made to feel that the way of the transgressor is hard. The terror of the law may thus become a minister of peace.

*Capacity to Testify.*DISTRICT OF COLUMBIA *v.* ARMES.

107 U. S. 519.—1882.

MR. JUSTICE FIELD. This was an action to recover damages for injuries received by the plaintiff's intestate, Du Bose, from a fall caused by a defective sidewalk in the city of Washington. In 1873, the board of public works of the city caused the grade of the carriageway of Thirteenth street, between F and G streets, to be lowered several feet. The distance between the curbstone of the carriageway and the line of the adjacent buildings was thirty-six feet. At the time the accident to the deceased occurred, this portion of the street — sidewalk it may be termed, to designate it from the carriageway, although only a part of it is given up to foot passengers — was, for forty-eight feet north of F street, lowered in its whole width to the same grade as the carriageway. But for some distance beyond that point, only twelve feet of the sidewalk was cut down, thus leaving an abrupt descent of about two feet at a distance of twelve feet from the curb. At this descent—from the elevated to the lowered part of the sidewalk—there were three steps, but the place was not guarded either at its side or end. Nothing was placed to warn foot-passengers of the danger.

On the night of February 21, 1877, Du Bose, a contract surgeon of the United States army, while walking down Thirteenth street, towards F street, fell down this descent, and, striking upon his knees, received a concussion which injured his spine and produced partial paralysis, resulting in the impairment of his mind and ultimately in his death, which occurred since the trial below.

The present action was for the injury thus sustained. He was himself a witness, and it appears from his testimony that his mind was feeble. His statement was not always as direct and clear as would be expected from a man in the full vigor of his mind. Still it was not incoherent, nor unintelligible, but evinced a full knowledge of the matters in relation to which he was testifying. A physician of the government hospital for the insane, to which the deceased was taken two years afterwards, testified that he was affected with acute melancholy; that sometimes it was impossible to get a word from him; that his memory was impaired, but that he was able to make a substantially correct statement of facts which transpired before the injury took place, though, from the impairment of his memory, he might leave out some important part, that there would

be some confusion of ideas in his mind, and that he should not be held responsible for any criminal act. A physician of the Freedmen's Hospital, in which the deceased was at one time a patient after his injuries, testified to a more deranged condition of his mind, and that he was, when there in June, 1879, insane. He had attempted to commit suicide, and had stuck a fork into his neck several times. Upon this, and other testimony of similar import, and the feebleness exhibited by the deceased on the stand, the counsel for the city requested the court to withdraw his testimony from the jury, on the ground that his mental faculties were so far impaired as to render him incompetent to testify as a witness. This the court refused to do, but instructed the jury that his testimony must be taken with some allowance, considering his condition of mind and his incapacity to remember all the circumstances which might throw some light on his present condition. This refusal and ruling of the court constitute the first error assigned.

The ruling of the court and its instruction to the jury were entirely correct. It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. In a case in the Prerogative Court of Canterbury, counsel stated that partial insanity was unknown to the law of England; but the court replied that if by this was meant that the law never deems a person both sane and insane at one and the same time upon one and the same subject, the assertion was a truism; and added: "If, by that position, it be meant and intended that the law of England never deems a party both sane and insane at different times upon the same subject; and both sane and insane at the same time upon different subjects; (the most usual sense, this last of the phrase of 'partial insanity'), there can scarcely be a position more destitute of legal foundation; or rather, there can scarcely be one more adverse to the stream and current of legal authority." *Dew v. Clark*, 3 Add. E. R. 79, 94.

The general rule, therefore, is, that a lunatic or person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Such was the decision of the Court of Criminal Appeal in England, in the case of *Reg v. Hill*, 5 Cox. Crim. Cas. 259. There the prisoner had been convicted of manslaughter; and on the trial a witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so; and that it was solely with reference to the delusion about the spirits that he considered him a lunatic. The witness himself was called, and he testified as follows: "I am fully aware I have a spirit, and twenty thousand of them. They are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many there are. The flesh creates spirits by palpitation of the nerves and the rheumatics. All are now in my body and around my head. They speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not." After much more of this kind of talk he added: "They speak to me instantly; they are speaking to me now; they are not separate from me; they are around me speaking to me now; but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot." He also stated his opinion of what it was to take an oath: "When I swear," he said, "I appeal to the Almighty. It is a perjury, the breaking of a lawful oath, or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn, and gave a perfectly collected and rational account of a transaction which he declared that he had witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said: "These creatures insist upon it, it was Tuesday night, and I think it was Monday;" whereupon he was asked: "Is what you have told us what the spirits told you, or what you recollected without the spirits?" And he said:



"No; the spirits assist me in speaking of the date, I thought it was Monday and they told me it was Christmas eve, Tuesday; but I was an eye witness, an ocular witness to the fall to the ground." The question was reserved for the opinion of the court whether this witness was competent, and after a very elaborate discussion of the subject it was held that he was. Chief Justice Campbell said that he entertained no doubt that the rule laid down by Baron Parke, in an unreported case which had been referred to, was correct, that wherever a delusion of insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony.

"Various authorities," said the chief justice, "have been referred to, which lay down the law that a person *non compos mentis* is not an admissible witness. But in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject-matter under consideration." And the chief justice added: "The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." He also observed that in a lunatic asylum the patients are often the only witnesses of outrages upon themselves and others, and there would be immunity for offences committed in such places if the only persons who can give information are not to be heard. Baron Alderson, Justice Coleridge, Baron Platt and Justice Talfourd agreed with the chief justice, the latter observing that, "If the proposition that a person suffering under an insane delusion cannot be a witness were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. Martin Luther believed that he had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences." This case is also found in the 2d of Denison and Pearce's Crown Cases, 254, where Lord Campbell is reported to have

said that the rule contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him. The doctrine of this decision has not been overruled, that we are aware of, and it entirely disposes of the question raised here.

Judgment affirmed.<sup>1</sup>

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### *Judicial Determination of Insanity.*

VANN, J., IN HUGHES *v.* JONES.

116 N. Y. 67, 72.—1889.

On the trial of this action the court found, as a fact, upon a conflict of evidence, "that said Richard Hughes, at the time of the execution and delivery of the said deed, \* \* \* was mentally competent to execute the same; that said deed was not executed by said Richard Hughes through force, fraud or undue influence imposed upon him by said defendants, or any or either of them, but the same was the free and voluntary act and deed of said Richard Hughes." It is conceded that there was sufficient evidence to sustain this finding, unless the record in the lunacy proceeding was conclusive evidence, and hence the facts found by the jury therein incapable of contradiction by the defendants in this action.

All contracts of a lunatic, habitual drunkard or person of unsound mind, made after an inquisition and confirmation thereof, are absolutely void, until by permission of the court he is allowed to assume control of his property. *L'Amoureux v. Crosby*, 2 Paige, 422; *Wadsworth v. Sharpstien*, 8 N. Y. 388; 2 R. S. 1094, sec. 10. In such cases the lunacy record, as long as it remains in force, is conclusive evidence of incapacity. *Id.*

Contracts, however, made by this class of persons before office found, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence. *Id.*; *Van Deusen v. Sweet*, 51 N. Y. 378; *Banker v. Banker*, 63 *Id.* 409. Under such circumstances the proceedings in lunacy are presumptive, but not conclusive evidence of a want of capacity. The presumption, whether conclusive or only *prima facie*, extends to all the world and includes all persons, whether they have notice of the inquisition or not. *Hart v. Deamer*, 6 Wend. 497; *Osterhout v. Shoemaker*, 3 Hill, 513; 1 Greenl. Ev. sec. 556.

These principles are now well settled in this state, and no question could have arisen as to the right of the defendants to show that

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<sup>1</sup> See, also, *Coleman v. Commonwealth*, 25 Gratt. 865.

the grantor, at the time the conveyance in question was executed, was of sound mind, but for the fact that the grantee was the petitioner in the lunacy proceedings. It is claimed that he thereby became a technical party to the record, as that expression is commonly understood in law, and, hence, that he is so completely bound by the finding of the jury as to be precluded from attempting to show the actual truth. This point does not appear to have been passed upon by the courts, although there are *dicta* of learned judges bearing somewhat upon it.

A party is ordinarily one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings almost without exception. Unless a party has some personal interest in the result he can have no standing in court. But any one, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute it was also the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed lunatic. (Code Civ. Pro. sec. 2323; *In re Smith*, 1 Russ. 348; *In re Persse*, 1 Moll. 439; Shelford on Lunatics, etc., 94; 2 Crary's N. Y. Pr. 5; Ordonaux, Judicial Aspects of Insanity, 218.

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The primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control. The petitioner can derive no direct benefit from it. The advantage to him, if any, is only such as would result if any other person had first acted in the matter.

Attentive study of the history, nature and object of lunacy proceedings leads to the conclusion that the petitioner therein is not a party to the record so as to be personally estopped by the finding of the jury, except as all the world is estopped.

We also agree with the learned General Term in its conclusion that the title to land was not involved in the proceeding under consideration, and that a commission to inquire as to the mental status of an alleged lunatic has no power to settle any such question. Such a tribunal is not adapted to so important an inquiry. It is not constituted for such a purpose, but simply to inform the conscience of the court as to a particular fact, for a special purpose. It would have no pleadings to guide it. No distinct issue upon the subject

could be presented. It would be only incidental to the main question, which relates to existing incapacity. When that is found, the care of the person and estate belongs to the court. Unless that is found the court has no further jurisdiction, whatever else may be found. No other inquiry can become material except from its relation to that question. The command of the commission is to inquire whether the person is a lunatic and if so, from what time, in what manner and how. The period of the incapacity is of no importance unless it includes the present time.

The secondary character of the inquiry as to duration is evident from the fact that if the jury find the alleged lunatic to be of sound mind, they have no power to pass upon any other question, even if they are of the opinion that he has been insane. Moreover, the petitioner would not be allowed to control the proceeding by a settlement or discontinuance or by submitting to a nonsuit, except by permission of the court, which could allow any one to continue if he abandoned it. Shelford, 22.

The difficulty of correcting errors by appeal or review is obvious. In fine, such a method of determining the title to real estate is opposed to the theory and policy of the law, which surrounds landed property with so many safeguards.

We think that the validity of the deed in question was not at issue, and that it could not be tried in the lunacy proceeding.

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### WILLWERTH *v.* LEONARD.

156 MASS. 277.—1892.

Two actions on the Pub. Sts. c. 175, to recover possession of certain premises in Boston. The plaintiff claimed title as lessee of Joseph Willwerth. The case was submitted to the Superior Court, and, after judgment for the plaintiff for possession and costs, to this court, on appeal, on an agreed statement of facts, the material portions of which appear in the opinion. If the plaintiff was not entitled to judgment, but if at a trial of the causes the plaintiff would be entitled to show certain facts bearing upon the mental condition of Joseph Willwerth, then a new trial was to be ordered.

MORTON, J. It appears that Joseph Willwerth, then of Boston, was adjudged insane, after due notice and hearing by the Probate Court of Suffolk county, December 12, 1881, and his wife was appointed his guardian. On May 31, 1888, he petitioned for the removal of his guardian for unsuitableness; and on June 15, 1888, further petitioned that she should be discharged, on the ground that



the guardianship was no longer necessary. Both petitions were dismissed by the Probate Court, and he appealed to the Supreme Judicial Court, in which, on May 27, 1890, decrees were entered affirming the decree of the Probate Court dismissing the petition for discharge of the guardianship, but reversing that on the petition for removal, and removing her, and remitting both cases to the Probate Court for further proceedings. On May 28, 1890, a petition was presented to the Probate Court at Cambridge, alleging that Willwerth was an inhabitant or resident of Cambridge, and asking for the appointment of one Avis Willwerth as guardian. This petition was assented to by Willwerth, but the Probate Court dismissed it. The lease in question was made on July 7, 1890.

The defendants have introduced no evidence except the copies relating to their various proceedings, and they contend that it appears from them that the decree by which Willwerth was adjudged insane is in force, and has never been revoked or modified, except so far as the removal of the guardian may have modified it, and that the lease was therefore ineffectual to pass to the plaintiff an interest in the premises described in it, because the decree conclusively shows that Willwerth was insane when it was made. We think this position cannot be sustained.

The removal of the guardian terminated the guardianship. *Loring v. Alline*, 9 Cush. 68, 70; *Allis v. Morton*, 4 Gray, 63; *Chapin v. Livermore*, 13 Gray, 561, 562; *Harding v. Weld*, 128 Mass. 587, 591. Sending the case back to the Probate Court for further proceedings did not qualify the terminating effect of the removal. It was a disposition of the case made necessary by the fact that it was in the hands of an appellate court. A new notice and a new hearing were necessary in the Probate Court to the appointment of another guardian. The court could not proceed on the strength of the former hearing and decree. *Harding v. Weld*, and *Allis v. Morton*, *ubi supra*. The title to the property remained all the time in the ward, and the guardian could make no contract relating to the property that would bind the ward when the guardianship ceased. *Hicks v. Chapman*, 10 Allen, 463. So long as the guardianship continued, the decree of the Probate Court may well have been regarded as conclusive on the question of the ward's sanity, on the ground that the decree fixed the ward's status as to all the world, and also because it might greatly have embarrassed the execution of his trust if the guardian could have been compelled to try the question of his ward's sanity in every action for or against him. *White v. Palmer*, 4 Mass. 147; *Leonard v. Leonard*, 14 Pick. 280; *Leggate v. Clark*, 111 Mass. 308, 310. But when the guardianship has terminated, and a contro-

versy has arisen between third parties, one of whom claims under a contract made with the ward after the termination of the guardianship, the reason ceases for holding the decree conclusive. Indeed, to give it the effect contended for by the defendants would be to place Willwerth, because of the former decree of the Probate Court, in the anomalous position of being unable to make contracts concerning his own property, although he is not under guardianship, and there is no petition pending to place him there, and the court could not use the former hearing and decree as the basis for the appointment of another guardian. If the decree, like a decree of divorce, fixed permanently the status of the party affected by it, then the case might stand differently; but it did not do that. Its disabling effect continued only so long as the guardianship continued. It is true that his petition for a discharge of the guardianship was dismissed. But the removal terminated the guardianship as effectually as a discharge would have done; possibly that may have been a reason for dismissing it. A guardianship may be terminated as well by death, removal, or resignation as by a discharge. *Loring v. Alline*, 9 Cush. 68. No method is provided in which, after a guardianship has for any cause ceased, the decree on which it was based may be annulled. We think, therefore, that the decree of the Probate Court is not conclusive on the question of Willwerth's insanity at the time of making the lease. Whether it is open to the defendants to raise the question of his insanity at that time, and whether, if it is, the decree would be admissible as evidence on that point, we need not now consider. The defendant's case does not rest on the ground that it is admissible as evidence tending to prove insanity, but on the ground that it conclusively establishes insanity. For aught that appears, the lease was valid, although, if another guardian were appointed, and he were able to show that Willwerth was insane when it was made, it could be avoided.

We have preferred to consider the case on the main question involved, and the view which we have taken of that renders it unnecessary to consider other questions that have been raised.

Judgment affirmed.

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### WOODWARD, J., IN *TOZER v. SATURLEE*.

3 GRANT'S CASES (PA.), 162, 163.—1855.

WHERE the contract of a lunatic or drunkard is in question, and the fact of lunacy or drunkenness is established by other means than a legal inquisition, it is always competent for the party alleging the

contract to prove a lucid interval — and even an inquisition is only persuasive evidence of incompetency as to contracts made before the inquest, but during the time the incompetency is found to have existed. We have several cases in our books in respect to such contracts, where evidence was admitted to counter-vail the effect of the inquisition. As to contracts made after the inquisition, our statute contemplates a complete transfer of the property to the custody of the law, and the committee is substituted for the lunatic or drunkard, and a lucid interval can avail nothing, for he has nothing in respect to which to contract. This is always the case where the proceeding is perfected. Where it is suspended or abandoned in mid-course, as seems to have been the case here, it may be doubted whether any stronger presumption is furnished by an inquisition as to contracts made after it was found, than as to such as were made previously, but within the ascertained period of incompetency. If no stronger, then it is not conclusive, and may be rebutted by such evidence as was offered here.

This, however, we repeat, is not a case of contract, but of mere declarations, confessedly competent evidence in themselves. If the established fact of lunacy or drunkenness does not as a general principle exclude such subsidiary proof when offered in respect to contracts, much less should it be permitted to deprive these declarations of the support expected from the evidence contained in the bill of exceptions.

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### MANLEY'S EXECUTOR *v.* STAPLES.

62 VT. 153.—1890.

THIS was an appeal from a decree of the Probate Court, admitting to probate the will of Madison S. Manley. Trial by jury at the March Term, 1889, Ross, J., presiding. Exceptions by the contestant.

It appeared that the contestant had applied to the Probate Court for the appointment of a guardian for the testator, on the ground that he was an insane person; and that this application had been, after a full hearing, denied, December 10, 1887. Shortly after this the will was made, and the evidence of the contestant showed that there had been no change in the mental condition of the testator between that date and the making of the will. The court held *pro forma* that the contestant was estopped by that decree from showing that the testator had not then sufficient testamentary capacity, withdrew the case from the jury, and certified the exceptions to the Supreme Court.

ROWELL, J.

\* \* \* \* \*

The fact that one is under guardianship as an insane person is not conclusive against his capacity to make a will while the guardianship continues. *Robinson's Exr. v. Robinson*, 39 Vt. 267. But it does not follow from this that the dismissal on the merits of an application for the appointment of a guardian of one as an insane person is conclusive in favor of his capacity to make a will. This is manifest when we consider the reasons for the decision in the case referred to.

The ground of appointing a guardian of a person as insane is, that by reason of mental weakness or distraction, or both, he is incapable of taking care of himself, and the object of it is to secure proper care of his person and property. *Robinson's Exr. v. Robinson*, above cited. It follows, therefore, that to refuse the appointment of a guardian of a person as insane, is an adjudication that he is not in such mental condition aforesaid as to be incapable of taking care of himself. It is not necessarily an adjudication that he is not insane at all; but only that he is not insane in a respect, nor to an extent, that renders him incapable of taking care of himself.

Insanity differs in kind and character as well as in extent and degree.

A man may be insane on some subjects and not on others. He may be insane on one subject and sane on all others. His insanity may be of such a character and run along such a line as in no wise to affect his capacity to take care of himself and his property. The insanity last mentioned would not warrant the appointment of a guardian over him, as it would not constitute the statutory cause for the appointment, and yet it might consist of such a delusion in respect of a disinherited child as to defeat a will that was the direct offspring of the partial insanity. It seems clear, therefore, that the question here involved was not necessarily involved in the proceedings before the Probate Court, and that its decree is not conclusive in the respect claimed.

Judgment reversed and cause remanded.<sup>1</sup>

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<sup>1</sup> "The jury found that the testator was not of sound, disposing mind and competent to make his will at the time of making the will in question. The mere fact that a testator is, at the time of making his will, under guardianship as to his person and property, may not of itself incapacitate him to make a valid will, provided he is capable, at the time, of comprehending the conditions of his property, his relationship to the natural objects of his bounty, and the disposition actually made of his property by such will. Under the evidence, we are unwilling to say that the trial court was not justified in holding, in effect, that at the time of making the will in question the testator had such comprehension, and hence mental capacity; so that the seventh finding of the jury, standing alone, might be fairly regarded as unsupported by the evidence."—*Will of Slinger*, 72 Wis. 22, 26.



OKEY, J., IN *WHEELER v. THE STATE*.

34 OHIO ST. 394, 396.—1878.

INQUISITIONS of this sort have been admitted in evidence in numerous cases, some of which were between private parties, and others concerned the public. 1 Greenl. Ev., sec. 356; 2 Ib., sec. 371; Freeman on Judgments, 606; *Banker v. Banker*, 63 N. Y. 409; *McGinnis v. Com.*, 74 Pa. St. 245; *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. St. 407. In 2 Phillipps' Ev. \*266, it is said: "An inquisition of lunacy is evidence on the trial of an indictment to show that the prisoner was insane when he committed the offence." To the same effect is Sharswood's Starkie's Ev. \*407; Shelford on Lunatics, 74.

Inquests of this character are analogous to proceedings *in rem*, affecting the general and public interest, and no one can strictly be regarded as a stranger to them. And such condition of things as the insanity of a party being shown, there is a presumption of more or less force, according to circumstances, that the same condition continued. Nor does the time which may have elapsed since the inquest was held affect the question of its admissibility (*Sergeson v. Sealy*, 2 Atkyns, 412), though, of course, it may have great force on the question of the weight of the evidence.

Ordinarily, such inquisitions are not conclusive, but only *prima facie* evidence of incapacity, as will be seen from the authorities cited; but, on a question like that in issue here, it is manifest that they cannot be regarded as even *prima facie* evidence. A person who is a fit subject for confinement in an insane asylum does not necessarily have immunity from punishment for crime; and the length of time between confinement in the asylum and the commission of the act charged, the nature of the crime, and other facts, may render such inquisition of little weight as evidence; but its weight is for the jury in each case.

The only criminal case cited by Phillips, in support of the passage quoted from his work, is *Rex v. Bowler*. That was a case tried before Gibbs, C. J., and Le Blanc, J., at Old Bailey, in June, 1812. It is fully stated in 3 Starkie's Ev., pt. 4, \*1704, and Shelford on Lunatics, 590. An inquest of lunacy was offered and admitted; but the defendant was convicted and executed, and it is manifest, from the reports of the case, that the record was admitted as evidence merely tending to prove insanity.

[DOMESTIC RELATIONS—38.]

## PART V.

### DRUNKENNESS.

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#### *Voidability of Contracts.*

BUSH *v.* BREINIG.

113 PA. ST. 310.—1886.

THIS was an action of assumpsit, brought by James H. Breinig against William H. Bush, to recover the portion of the purchase money paid by him in pursuance of a contract executed when, he alleges, he was in such a state of drunkenness as not to know what he was doing, and had lost the use of his reason and understanding. Plea, *non assumpsit*, payment with leave.

William H. Bush, the owner of a hotel property in Quakertown, offered the same for sale at a public sale, on October 24th, 1883. Breinig attended the sale, and became the purchaser at \$1,340, he being the highest bidder. About an hour after the property was knocked down to him he executed a written contract in conformity with the conditions of the sale, paid \$495 in cash, and gave his note for \$845. Breinig alleged that at the time he signed the contract, gave the note and paid the cash, he was in such a state of drunkenness as to suspend his reason and understanding.

MR. JUSTICE TRUNKEY. When the plaintiff's bid was accepted the bargain was struck, and there was an oral agreement for the sale and purchase of the land on the terms stated in the conditions of sale. That agreement was not void, but voidable. Neither party could have compelled specific performance. Either would have a right of action for damages resulting from non-performance by the other; but the vendee could not tender a deed and recover the purchase money, for that would be enforcing specific performance; he could only recover the actual loss.

Upon the signing of the conditions, *prima facie*, there was a contract that could be specifically enforced. Money paid on either the oral or written contract could not be recovered unless there was cause for rescission. Here, it is conceded that there was an oral contract; but the plaintiff denies that he made a written contract and paid money and note thereon, because at the time his signatures

and money were given he was incapable of making a contract by reason of drunkenness. If he was without reason and understanding the payment of the money ought not to be treated as voluntary, nor his signature as creating a new obligation. The conditions of sale may have been read in his hearing at the auction, and he may have understood them when he bid; but he paid no money until the time of signing the alleged contract, and if he was then bereft of reason he may avoid the apparent obligation made while in that condition.

It is not a question whether what he did was the carrying out of a fair and reasonable oral contract, or whether the property was worth the sum bid; it is a question of his capacity to make a contract at the time he signed the conditions and paid the money. The subject of the contract was not necessary for himself or family; he took nothing into his possession and, therefore, had nothing to restore in the act of rescission; and he brought suit so promptly that at the trial the question of delay in rescinding was not raised.

The rule formerly was, that intoxication was no excuse, and created no privilege or plea in avoidance of a contract; but it is now settled according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable, and may be avoided by himself, though the intoxication was voluntary, and not procured by the circumvention of the other party. Kent's Com. vol. 2, p. 451. A drunkard, when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract in general; but his contract is voidable only and not void, and may therefore be ratified by him when he becomes sober. Benjamin on Sales, sec. 33.

The learned judge of the Common Pleas instructed the jury that the plaintiff could recover only on the ground that the contract did not bind him because he was intoxicated to a degree that he did not know what he was doing at the time he affixed his seal and gave the money; that if he was in such a state of drunkenness as not to know what he was doing, he cannot be compelled to perform the contract; and that if at the time of signing the contract, he was able to comprehend the nature and effect thereof, the alleged intoxication is no defence. All that accords with principles so well settled as to be found in approved text-books. They apply to a case like this; not where an intoxicated man gave his negotiable paper, which had passed to an innocent holder for value, as was the case in *State Bank v. McCoy*, 69 Pa. 204.

In answer to the defendant's first point the court charged that

the drunkenness of the plaintiff, to relieve him from the contract must have been such that he did not know what he was doing; it must have been such as to suspend the use of reason and understanding. There is no error in that. True, the word "utterly" is omitted, which is used in the defining of the state of drunkenness, in Story's Eq. Jur., sec. 231; but the sense is not materially different; and that word is omitted by many in the attempt to define the degree of intoxication and absence of reason. The point was well answered; its simple affirmance might have misled the jury; "unfair advantage" was not a question submitted.

The fifth assignment is not sustained. Although the question ought not to have been allowed when put, for the reason stated in the objection, very soon there was testimony that the witness was intoxicated at the time referred to in the question. No objection was made to its form, and its admission out of order was harmless.

None of the remaining assignments require special remark.

Judgment affirmed.<sup>1</sup>

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### *Torts by Drunken Persons.*

#### REED *v.* HARPER.

25 IA. 87.—1868.

**ACTION** for slander. Jury trial. Verdict and judgment for plaintiff for seven hundred dollars. The defendant appeals.

COLE, J. The defendant is charged to have spoken of the plaintiff, "he is a damned thief, he stole from me;" and also, "he swore to a lie at Marion, and I can prove it." The petition avers that before the speaking of the words last specified, there had been a suit pending in the District Court of Linn county, at Marion, between these parties, wherein the plaintiff was sworn and testified as a witness. The evidence showed the speaking of the words and the pendency of the suit. The defendant testified, that at the time he was charged to have spoken the words, "he was for the first time in a fix, that he did not know what he was about, and that he had no recollection of what was said or took place there, or how he got home."

The only point insisted on in argument is, that the court should have instructed the jury that if they believed from the evidence, that the defendant was so intoxicated at the time he spoke the

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<sup>1</sup> See, also, *Barrett v. Buxton*, 2 Aikens (Vt.) 167.



words, that he did not know what he was about, the plaintiff could not recover. The court did not so instruct, but did instruct the jury, that it is no sufficient cause to defeat the action if it appears that the defendant was drunk when he uttered the words, if he did utter them; but in considering the amount of the verdict, it was their duty to consider all the facts and circumstances attending and surrounding the speaking of the words. In this the court did not err. Drunkenness will not excuse a slander. *McKee v. Ingalls*, 4 Scam. 30.

As to the other errors assigned, but not insisted on in argument, we may say, that we have examined them *seriatim*, and find no error to defendant's prejudice.

Affirmed.

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### *Crimes by Drunken Persons.*

#### O'GRADY *v.* STATE.

36 NEB. 320.—1893.

MAXWELL, Ch. J. The plaintiff in error was convicted of attempting to pass a forged check and was sentenced to imprisonment in the penitentiary for two years. All the testimony in the case upon that point tends to show that the plaintiff in error was intoxicated at the time, and the question presented is to what extent, if at all, excessive drunkenness, not entered into for the purpose of committing crime, may be considered by the jury in determining the intention of the accused. The court instructed the jury: "The jury are instructed that voluntary intoxication or drunkenness is no excuse for a crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act. Where without intoxication the law would impute a criminal intent, proof of drunkenness will not avail to disprove such intent where the drunkenness is voluntary." It will be observed that the instruction contains two propositions, viz., that drunkenness is no excuse for crime unless it produces actual insanity or loss of reason, and, second, that where the intoxication is voluntary, proof of intoxication cannot be considered to disprove intent. The rule as stated in the second part of the instruction, being without qualification, is too broad. While it is true that intoxication is not a justification or excuse for crime it is also true that at the present time evidence of intoxication may be admitted to determine whether or not a crime has been committed or where it consists of several degrees depending on the intent, the grade of the offence.

*Cline v. State*, 43 Ohio St. 334, 335, which in our view states the law correctly, is as follows: "Where a person having the desire to do to another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offence; but at present the rule that intoxication aggravates crime is confined to cases of that class. The rule is well settled that intoxication is not a justification or an excuse for crime. To hold otherwise would be dangerous to and subversive of public welfare. But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed, or where a crime consisting of degrees has been committed, such evidence may be important in determining a degree. Thus, an intoxicated person may have a counterfeit bank bill in his possession for a lawful purpose, and, intending to pay a genuine bill to another person, may, by reason of such intoxication, hand him the counterfeit bill; as intent in such case is of the essence of the offence, it is possible that in proving intoxication you go far to prove that no crime was committed. *Pigman v. State*, 14 Ohio, 555. So where the offence charged embraces deliberation, premeditation, some specific intent, or the like, evidence of intoxication may be important, and it has frequently been admitted. *Id.*; *Nichols v. State*, 8 Ohio St. 435; *Davis v. State*, 25 Id. 369; *Lytle v. State*, 31 Id. 196. The leading case of *Pigman v. State* has been repeatedly cited with approval. *People v. Robinson*, 2 Park. 235; *People v. Harris*, 29 Cal. 678; *Roberts v. People*, 19 Mich. 401; *State v. Welch*, 21 Minn. 22; *Hopt v. People*, 104 U. S. 631; *State v. Johnson*, 40 Conn. 136 and no doubt the law upon the subject is correctly stated in that case, and that the rule as there expressed is humane and just, but there is always danger that undue weight will be attached to the fact of drunkenness where it is shown in a criminal case, and courts and juries should see that it is only used for the purpose above stated, and not as a cloak or justification for crime. See, also, *U. S. v. Drew*, 5 Mason, 28; s. c., 1 Lead. Crim. Cas. (2d ed.), 131, note; *Reg. v. Davis*, 14 Cox, C. C., 563; s. c., 28 Moak, Eng. Rep. 657; note, Lawson on Insanity, 533-768, where all the cases are collected relating to the admissibility and effect in criminal cases of proof of intoxication."

Drunkenness is not favored as a defence, and in *Johnson v. Phifer*, 6 Neb. 402, this court held that it could not relieve a party from a contract on the ground that he was drunk when it was entered into unless his condition reached that degree which may be called excessive drunkenness, where a party is utterly deprived of reason and understanding. This, in our view, is the true rule. As much as we

may desire to discourage drunkenness, and deplorable as the habit of drinking, with its train of wrecks and ruin, may be, we must still recognize the frailty of human beings, and adapt the law to the actual condition of the party.

In *Pigman v. State*, *supra*, it is said: "The older writers regarded drunkenness as an aggravation of the offence and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals; yet every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink, which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy, when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so abhors as the cool, deliberate, and settled purpose to do mischief. That is a quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication, although, to be punished, may to some extent be softened and set down to the infirmities of human nature. Hence, not regarding it as an aggravation, drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind necessary to constitute murder in the first degree. The principle is undoubtedly right. So, on a charge of passing counterfeit money; if the person is so drunk that he actually did not know that he passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight."

If he was so drunk as to be deprived of reason and understanding, that is a fact for the jury to consider with the other facts proved, in determining the guilt or innocence of accused. The judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

The other judges concur.

PEOPLE *v.* WALKER.

38 MICH. 156.—1878.

COOLEY, J. The defendant was convicted in the court below for the larceny of a sum of money from one Martin. All the evidence in the case tended to show that if the defendant took the money wrongfully, it was while he was under the influence of liquor, and some of it indicated that he was very drunk.

The circuit judge was requested to charge the jury, that “even if the jury should believe that the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the alleged offence, it is no excuse for him, and they should not take it into consideration. A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences.” This charge was given in reliance upon the general principle that drunkenness is no excuse for crime.

While it is true that drunkenness cannot excuse crime, it is equally true that when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. In larceny the crime does not consist in the wrongful taking of the property, for that might be a mere trespass; but it consists in the wrongful taking with a felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime cannot have been committed. This was fully explained by Mr. Justice Christy in *Roberts v. People*, 19 Mich. 401, and is familiar law. See also *Nichols v. State*, 8 Ohio (N. S.) 435; *Regina v. Moore*, 3 C. & K. 319.

This instruction being erroneous, the conviction must be set aside.

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PECKHAM, J., IN PEOPLE *v.* LEONARDI.

143 N. Y. 360, 364.—1894.

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At common law drunkenness was not only not an excuse for crime, but evidence of intoxication, while admissible, and to be considered in some cases, was yet generally of no avail. If a man made himself voluntarily drunk it was no excuse for any crime he might commit while he was so, and he had to take the responsibility of his own voluntary act. If the assault were unprovoked, the fact of intoxication would not be allowed to affect the legal character of the



crime. The fact of intoxication was not to be permitted to be even considered by the jury upon the question of premeditation. These principles are stated in many cases in this court. *People v. Rogers*, 18 N. Y. 9; *Kenny v. People*, 31 Id. 330; *Flanigan v. The People*, 86 Id. 554.

The strict rule of the common law has, however, been slightly relaxed by our Penal Code, the twenty-second section of which reads as follows:

"No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive or intent with which he committed the act."

Under this section it has been held by this court that it is not proper to charge the jury that the mere fact of intoxication is necessarily evidence even tending to show an absence of premeditation and deliberation. Such fact, the court said, might tend in some cases to show absence, while in others it might not. We held that it was now simply the duty of the judge to leave it to the jury to take into consideration the question of intoxication determining the motive or intent of the accused, and whether he acted with deliberation and premeditation. *People v. Mills*, 98 N. Y. 176. We do not think that under this statute the intoxication need be to such an extent as to necessarily and actually preclude the defendant from forming an intent or from being actuated by a motive before the jury would have the right to regard it as having any legal effect upon the character of the defendant's act. Any intoxication, the statute says, may be considered by the jury, and the decision as to its effect rests with them. That a man may be even grossly intoxicated and yet be capable of forming an intent to kill or do any other criminal act is indisputable, and if, while so intoxicated, he forms an intent to kill and carries it out with premeditation and deliberation, he is without doubt, guilty of murder in the first degree, and the jury should, when such a defence is interposed, be so instructed. It is a most important and far-reaching statute in its possible effects, and the jury ought to be warned that where the criminal act is fairly and clearly proved, the fact of intoxication as furnishing evidence of the want of the criminal intent which the proof might otherwise show, should be considered by it with the greatest care, caution and circumspection, and such fact ought not to be allowed to alter the character or grade of the criminal act unless they have a fair and

reasonable doubt of the existence of the necessary criminal purpose or intent after a consideration of such evidence of intoxication. The safety of society depends to a large extent upon the due administration of our criminal law, and the voluntary intoxication of an accused person should be most cautiously considered before arriving at a conclusion that it has in any way altered the character or grade of a criminal act. It ought always to be borne in mind that by the terms of the very statute cited no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. In other words, it should still be remembered that voluntary drunkenness is never an excuse for crime. In *People v. Fish*, (125 N. Y. 136), it was held that under this section of the Penal Code, if the accused be sober enough to and do form an intent and so deliberate upon and premeditate the crime, then he is responsible the same as if he had been perfectly sober, and that he is guilty even though intoxicated. By our statute deliberation and premeditation are necessary constituents of the crime of murder in the first degree, and if by reason of intoxication the jury should be of opinion that the deliberation or premeditation necessary to constitute murder in the first degree did not exist, the crime is reduced to a lower grade of murder, or in the absence of any intent to kill, then to manslaughter in some of its grades. The intoxication need not be to the extent of depriving the accused of all power of volition or of all ability to form an intent. The jury should be instructed that if the intoxication had extended so far in its effects that the necessary intent, deliberation and premeditation were absent, the fact of such intoxication must be considered and a verdict rendered in accordance therewith. In the portion of the charge of the learned judge which has been above set forth we fear that he required evidence of the existence of too great a degree of intoxication before the jury were permitted to find the absence of the necessary intent or degree of deliberation or premeditation. I have endeavored to state what the rule is in such cases.

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In this case the error in the charge was of the most vital nature, and although possibly it may be open to the claim that it was given with reference to the question as to what amount of intoxication formed an excuse to the defendant, yet we are fearful that the jury may have been misled and may have thought that the language appertained to the subject of considering the extent of the intoxication of the defendant with reference to the intent with which he struck the blows.

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## PART VI.

### ALIENS.

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#### *Alien Friends.*<sup>1</sup>

##### I. PROPERTY RIGHTS.

#### GREENHELD *v.* MORRISON.

21 IA. 538.—1866.

COLE, J. The only question made by the demurrer is as to the right and capacity of a non-resident alien to take a distributive share of an intestate's estate in this state. No question need arise in the determination of this case, as to the construction of the act of 1858 (Rev. secs. 2488 to 2493), since, so far as that act relates to personal property, it is probably only declarative of the common law.

At the common law, aliens were capable of acquiring, holding and transmitting movable property in like manner as our own citizens, and they can bring suits for the recovery of that property. 2 Kent's Com. 62. Aliens are not deprived of any of these rights by our statutes. The provision of our statute (Rev. sec. 2422), which provides that personal property "shall be distributed to the same persons and in the same proportion as though it were real estate," does not prevent aliens from taking distributive shares of personal estate, although non-resident aliens might not take real estate by descent.

Our statute provides (Rev. sec. 2436), that the real estate of a decedent, subject to dower, etc., "shall descend in equal shares to his children." Yet if any of his children are non-resident aliens (aside from some other statute on the subject), such non-resident alien children would not take any portion, for that he would have no inheritable blood. In other words, both these sections, like all other statutes, are construed, in the light of and with reference to the common law relating to the same subject-matter.

Affirmed.

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<sup>1</sup> As to the limitation, independent of statutory or constitutional provision, upon the capacity of an alien to hold public office, see *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Id. 96.

## JUDGE, J., IN HARLEY v. THE STATE.

40 ALA. 689, 695.—1867.

Under the demurrer interposed in the court below, the following allegations of one of the pleas are to be taken as true: 1st, that Harley purchased the lands described in the information, on the 2d day of April, 1857, and that there was a conveyance to him of the title on that day; 2d, that, at the time of the said conveyance, Harley was an unnaturalized alien, but that previously thereto he had filed his declaration of intention to become a citizen of the United States, and was duly admitted to such citizenship on the 1st of November, 1860, by the judgment of the Circuit Court of Cook county, in the state of Illinois. These allegations present the merits of the main question involved, which we proceed to consider.

An alien may acquire lands by purchase, but not by descent; and there is no distinction, whether the purchase be by grant or by devise; in either event, the estate vests in the alien as a defeasible estate, subject to escheat at the suit of the government. He has complete dominion over the estate of which he is thus seized, until office found; may hold it against every one, even against the government, and may convey it to a purchaser — that is to say, may convey a defeasible estate only, subject to be divested on office found. The ancient rule of the common law was, that an alien could not maintain a real action for the recovery of lands, but he might, in such action, defend his title against all persons but the sovereign. It has been held, however, in North Carolina, if not in other states of the Union, that he may maintain ejectment. The common law was, also, that the king could not grant lands forfeited by alienage, until he was in possession by office found; but, when the alien died, the sovereign was seized without office found, because, otherwise, the freehold would be in abeyance, as the alien could have no inheritable blood.

As to grants for the cause of alienage, by state legislation, without an inquest of office, Judge Story has said, "That an inquest of office should be made in cases of alienage is a useful and important restraint upon public proceedings. It protects individuals from being harassed by numerous suits, introduced by litigious grantees. It enables the owner to contest the question of alienage directly, by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent, of its acquisitions *pro defectu haredis*. And, above all, it operates as a salutary



suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603. But each state has the undoubted right to enact laws regulating the descent of, and succession to, property within its limits, and consequently to permit inheritance by or from an alien.

We refer to the following authorities, as sustaining the propositions of law hereinbefore announced: 2 Kent, 62-64; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; *Orr v. Hodgson*, 4 Wheaton, 453; *Gouverneur's Heirs v. Robertson*, 11 Wheaton, 332; *Scanlan v. Wright*, 13 Pick. 532; *Montgomery v. Dorian*, 7 New Hamp. 475; *People v. Folsom*, 5 Cal. 373; *Rouche v. Williamson*, 3 Iredell, 141; *Waugh v. Riley*, 8 Metcalf (Mass.) 290; *Wilbur v. Tobey*, 16 Pick. 177; *Etheridge v. Malempre*, 18 Ala. 565.

When Harley purchased the land in controversy, and during the period of his alienage thereafter, he was seized of a defeasible estate in the premises, accompanied with all the incidents of ownership of such an estate. During the same period, the only right which the state could have in the premises was the right to have the land escheated, by a judicial proceeding in the nature of an inquest of office. This prerogative right of sovereignty was not asserted during the period of Harley's alienage; but he was permitted to retain his estate, without molestation, until he had been admitted to full citizenship. This result effected an extinguishment of the right of the state to escheat the land, if such right existed, and perfected the title of Harley. As Sir Matthew Hale has said, "The law is very gentle in the construction of the disability of alienism, and rather contracts than extends its severity." 2 Kent, 56-62. See also *Jackson v. Beach*, 1 Johnson's Cases, 399; *White v. White*, 2 Met. (Ky.) 189.

Foreigners are admitted to the rights of citizenship with us, on liberal terms; and the public policy of the United States, in regard to their becoming citizens, as shown by the naturalization laws of the government, is certainly in harmony with the main conclusion attained in the present case. 2 Kent's Com. 56. \* \* \*

Judgment reversed and cause remanded.

WILDE, J., IN WAUGH *v.* RILEY.

8 MET. (MASS.) 290, 294.—1844.

IT was objected that Riley, the mortgagor, was an alien, and that, by the deed of conveyance to him, the estate immediately vested in the commonwealth; he being incapable of taking and holding real estate. But the doctrine is very clearly established, by numerous authorities, that an alien may take a freehold, and hold it until office found. It is true that, by the strictness of the common law, it has been held that an alien cannot maintain an action for the recovery of possession of real estate. But in all the cases in which this doctrine is maintained it is held that he may take and hold real estate until office found, and that he may hold it against all the world except the government. So that an alien may defend, but he cannot prosecute, in a real action.

It is justly remarked by Savage, C. J., in *Bradstreet v. Supervisors of Onondaga County*, 13 Wend. 548, that "it seems strange that any person who, by our laws, may take real estate, and hold it against all the world except the government, should not be at liberty to prosecute for the recovery of possession." However this may be, it is unquestionable that an alien may take and hold real estate against every person, until office found, and may convey his right and title to a purchaser. The question whether an alien can prosecute for the recovery of possession of real estate does not arise in this case. But it was decided, in the case in 13 Wend. above cited, that notwithstanding the ancient rigor of the common law, as laid down in sundry cases, such an action might be maintained; and the reasons given by Chief Justice Savage, in support of the decision, are very cogent

REESE *v.* WATERS.

4 WATTS &amp; S. (PA.) 145.—1842.

THIS was an action of ejectment by David Reese against Humphrey Waters and Achsa, his wife, for a tract of land containing fifty-one acres.

It appeared that Achsa Snodgrass was seized in fee of the land in dispute, and was married to Humphrey Waters, who was an alien. David Reese, the plaintiff, obtained a judgment against Humphrey Waters, upon which an execution was issued and levied on the land, upon which an inquisition was held, by which it was extended and valued at \$100 per annum. A *liberari facias* was issued, and returned

" Possession delivered to the plaintiff." Whereupon this action of ejectment was brought, and the question raised on the trial was — whether, by the law of Pennsylvania, an alien acquires any title in his wife's estate of inheritance, as tenant by the curtesy initiate.

Upon the trial, the court directed a verdict for the plaintiff, reserving the point: it was then argued before their honors, Judges Grier and Shaler, and the former delivered the opinion of the court upon the reserved point, and directed a judgment for the defendant *non obstante veredicto*.

PER CURIAM. Our act of 1833 has dispensed with the birth of issue as a constituent of tenancy by the curtesy; and had the husband, in this instance, been an American citizen, he would have been tenant by the curtesy initiate by force of the marriage alone, and seized of a freehold in his own right. The cause, then, is without difficulty so far as it depends on the common law, which forbids an alien to take by purchase for the benefit of any one but the crown or the commonwealth, or to take at all, where the estate would devolve on him by operation of law. It has been expressly decided that an alien cannot be tenant by the curtesy, and the disability which prevents him from being seized in his own right would equally prevent him from being seized, in right of his wife, of her freehold, whether of inheritance or not of inheritance. \* \* \*

Judgment affirmed.<sup>1</sup>

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<sup>1</sup> " It is suggested that without office found the estate would descend to the heir. But the law is, that if an alien purchase land, or if land be devised to him, he may take and hold until an inquest of office; but upon his death the land would instantly and of necessity (as the freehold cannot be kept in abeyance), without any inquest of office, escheat and vest in the State, because he is incompetent to transmit by hereditary descent. See the cases cited, 2 Kent's Com. 54. If, therefore, John Lawyer was incapable (on account of alienage) of holding real estate in Pennsylvania, and of transmitting it to alien heirs, his estate escheated to the commonwealth on his death without inquest of office; it became vested in the Commonwealth, and they had power to transfer it by act of the legislature to the widow, who took it subject to the rights of others by the express saving in the act. When the legislature, therefore, by the act of the 25th of February, 1814, granted to Anna Maria Lawyer, the wife of the deceased, the interest which they had by escheat, they passed the estate accruing to them by the alienage of the heirs."—SERGEANT, J., in *Rubeck v. Gardner*, 7 Watts (Pa.) 455, 458.

At common law a devise by an alien vested his defeasible title in the devisee. See Schouler on Wills (2d ed.), §§ 34, 35.

## MAGRUDER, J., IN WUNDERLE v. WUNDERLE.

144 ILL. 40, 53.—1893.

IT is a general rule of the common law, that the title to real property must be acquired and passed according to the *lex rei sitæ*. This rule not only applies to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. The descent and heirship of real estate are governed by the law of the country where it is located. Story on Conf. of Laws, secs. 424, 448, 483, 509; *Stoltz v. Doering*, 112 Ill. 234. This principle, originally applicable as between countries entirely foreign to each other, also prevails as among the states of the American Union. From it results the doctrine, that the title of aliens to land within the limits of the several states is matter of state regulation. Williams on Real Property (4th ed.) page 64, note 1; Lawrence's Wheaton on International Law, page 168 n.; Story on Conf. of Laws, sec. 430; Wheaton's Int. Law (Boyd, 3d ed.) page 132; 2 Wharton's Inter. Law Dig., bottom pages 490 and 497; Field's Inter. Code, (2d ed.) page 176. But while it is true that "the right of foreigners to hold title to real estate is entirely dependent on the laws of the state in which the land is situate," (2 Wharton's Int. Law Dig. sec. 201, page 490), it is also true, that the state law must give way if it conflicts with any existing treaty between the government of the United States and the government of the country of which such foreigner is a subject or citizen.

Article 6 of the Federal Constitution provides that "all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." In construing this article it has been held, that provisions in regard to the transfer, devise or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual states whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property. *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, 133 U. S. 258; *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat. 259; *Orr v. Hodgson*, 4 Wheat. 453; *Fairfax v. Hunter*, 7 Cranch,



603; *The People v. Gerke*, 5 Cal. 381. But the treaty which will suspend or override the statute of a state, must be a treaty between the United States and the government of the particular country, of which the alien claiming to be relieved of the disability imposed by the state law, is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of.

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2. CAPACITY TO SUE AND BE SUED.

LORD ESHER, M. R., IN *MIGHELL v. SULTAN OF JOHORE*.

[1894.] 1 Q. B. 149, 157. (Eng.)

FOR the purposes of my judgment I must assume that the Sultan of Johore came to this country and took the name of Albert Baker, and that the plaintiff believed that his name was Albert Baker, and I will go so far as to assume for the present purpose that he deceived her by pretending to be Albert Baker, and then promised to marry her, and that he broke his promise. Whether these matters could be proved, if the case went further, is entirely another matter; but at the present stage of the case I will assume them to be true. At length, when he is sued, he alleges that he is a sovereign prince, and that no action can be maintained against him in the municipal courts of this country for anything which he has done. An elaborate argument has been presented to us on behalf of the plaintiff which was not altogether new, for I remember to have heard something very like it in the case of *The Parlement Belge*. 5 P. D. 197. In this argument there was only one point which appeared to have much weight, viz., that very great judges in the House of Lords and in the Queen's Bench had formerly declined to determine the principle point now raised. If the matter had stood there, I should have thought that it might be necessary for us to look into all the authorities on the subject. But I think that we did so in the case of *The Parlement Belge*, and that the point in this case is not now before the Court of Appeal for the first time, but was really decided in that case, which decision would, of course, be binding on us in the present case, even if any of us did not agree with it.

The first point taken was that it was not sufficiently shown that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly

came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of the *Charkieh*. Law Rep. 4 A. & E. 59. I know he did, but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign. For this purpose all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest.

It being established that the defendant is in that position, can he be sued in the courts of this country? It is not contended that he could, unless by coming into this country, and living there under a false name, and — I will assume for the present purpose — by so deceiving the plaintiff, he has lost the privilege as an independent sovereign and made himself subject to the jurisdiction. In the case of *The Parlement Belge* the whole subject was carefully considered. As I have pointed out, great judges in the House of Lords and the Queen's Bench had in previous cases declined to decide this point, but I think that this court was there called upon to decide the point, and did decide it. I said, in giving the judgment of the court in that case, after citing passages from various authorities, and a minute examination of the cases on the subject (see p. 214 of the report), "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." It appears to me that, by the authority of this court, the rule was thus laid down absolutely and without qualification. We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; everybody

knows and understands that a foreign sovereign may do that. But the question is, How? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shown that he is an independent sovereign, and does not submit to the jurisdiction, the court has no jurisdiction over him. It follows from this that there can be no inquiry by the court into his conduct prior to that date. The only question is whether, when the matter comes before the court, and it is shown that the defendant is an independent sovereign, he then elects to submit to the jurisdiction. If he does not, the court has no jurisdiction. It appears to me that this is the result of the principles laid down in the *Parlement Belge*. Therefore, I think the court has no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff, the defendant being an independent sovereign, and not submitting himself to the jurisdiction. For these reasons the appeal must be dismissed.<sup>1</sup>

### ROBERTS v. KNIGHTS.

7 ALLEN (MASS.) 449.—1863.

CONTRACT brought in the Police Court of Boston by the plaintiff, who is a British subject, against the master of a British vessel, who is also a British subject. The defendant objected, in the Police Court, that the court had no jurisdiction, and a hearing was thereupon had upon all the questions involved, and the case was dismissed, and the plaintiff appealed to the Superior Court.

CHAPMAN, J. The question now presented is, whether our courts are bound to take jurisdiction of this case, both the parties being aliens, and having only a transient residence within the commonwealth.

The Gen. Sts. do not settle the question. Not much light is thrown upon it by c. 123, sec. 1, cited by the plaintiff's counsel, which provides that, if neither party lives in the state, a transitory action may be brought in any county. Nor have we been able to

<sup>1</sup> A foreign sovereign may sue in an American State court. *King of Prussia v. Kuepper's Adm'r*, 22 Mo. 550.



find any provisions in any of our treaties with Great Britain which give us any aid. The question whether the courts of a country ought to take jurisdiction of litigation between aliens, temporarily residing within its limits, is primarily one of the international law.

Vattel, b. 2, c. 8, sec. 103, says that by the law of nations, disputes that may arise between strangers, or between a stranger and a citizen, ought to be terminated by the judge of the place, and also by the laws of the place. In 2 Kent's Com. (6th ed.), 64, this authority is cited, and the law is stated to be that if strangers are involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. No distinction is made between transient and permanent residents.

In 1650 our colonial legislature passed an act, reciting that "whereas oftentimes it comes to pass that strangers coming amongst us have sudden occasions to try actions of several natures in our courts of justice," the right is therefore given to them. 3 Col. Rec. 202. See, also, Anc. Chart. 91. In 1672 another act was passed, confirming and regulating the right. 4 Col. Rec. part 2, 532. See, also, Anc. Chart. 192. These acts make no exception of cases of transient residence, and they established our municipal law at a very early date.

In *Barrell v. Benjamin*, 15 Mass. 354, it was objected that the defendant, whose domicil was in Demerara, being transiently here, was was not liable to be sued in our courts by the plaintiff, whose domicil was in Connecticut, and who was also transiently here. The precise question which arises in the present case was not before the court, but the reasoning of Parker, C. J., goes to sustain the marginal note of the case, which is as follows: "It seems that one foreigner may sue another who is transiently within the limits of this state, upon a contract made between them in a foreign country."

In *Judd v. Lawrence*, 1 Cush. 531, it was held that an alien resident within the commonwealth is entitled to the benefit of the insolvent laws. Since St. 1852, c. 29, aliens have been able to take, hold and transmit real estate. It seems, therefore, to be the policy of modern times to enlarge rather than diminish the rights and privileges of aliens.

The courts of the United States have not jurisdiction where both parties are aliens, because this is not one of the enumerated cases in which jurisdiction is given to them. *Barrell v. Benjamin*, *ubi supra*; *Turner v. Bank of North America*, 4 Dall. 11; *Hodgson v. Bowerbank*, 5 Cranch, 303.

The argument *ab inconvenienti*, which is urged on behalf of the defendant, has much force. It is extremely inconvenient to one who



is temporarily in a foreign country to be sued by a fellow countryman in its courts. But it is met by an argument of equal force on the other side. If the plaintiff had no such remedy, he would often be subjected to great hardships; on the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.

The defendant relied upon a clause in the Merchant's Shipping Act (17 & 18 Vict. c. 104,) which provides that, in a contract like that of the plaintiff, no seaman shall sue for wages in any court abroad, except in cases of discharge or of danger to life.

But this act cannot affect the question of jurisdiction, which on the motion to dismiss, is the only question to be considered.

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### *Alien Enemies.*

#### I. CONTRACTS WITH ALIEN ENEMY.

#### KERSHAW *v.* KELSEY.

100 MASS. 561.—1868.

GRAY, J. The defendant, a citizen of Massachusetts, in February, 1864, in Mississippi, took from the plaintiff, then and ever since a citizen and resident of Mississippi, a lease for one year of a cotton plantation in that state, and therein agreed to pay a rent of ten thousand dollars, half in cash, and half "out of the first part of the cotton crop, which is to be fitted for market in reasonable time." The lessor also agreed to deliver, and the lessee to receive and pay the value of, the corn then on the plantation. It does not appear whether the defendant went into Mississippi before or after the beginning of the War of the Rebellion; and there is no evidence of any intent on the part of either party to violate or evade the laws, or oppose or injure the government of the United States. The defendant paid the first installment of rent, took possession of the plantation and corn, used the corn on the plantation, provided it with supplies to the amount of about five thousand dollars, and planted and sowed it, but early in March was driven away by rebel soldiers, and never returned to the plantation, except once in April following, after which he came back to Massachusetts. The plaintiff continued to reside on the plantation, raised a crop of cotton there, and delivered it in Mississippi to the defendant's son, by whom it was

forwarded in the autumn of the same year to the defendant; and he sold it and retained the profits, amounting to nearly ten thousand dollars.

The plaintiff sues for the unpaid instalment of rent, and the value of the corn. The claims made in the other counts of the declaration have been negatived by the special findings of the jury.

The defendant, in his answer, denied all the plaintiff's allegations; and at the trial contended that the lease, having been made during the civil war, was illegal and void, as well by the principles of international law, as by the terms of the act of Congress of 1861, c. 3, sec. 5, and the proclamations issued by the president under that act, declaring "all commercial intercourse by and between" the state of Mississippi and other states in which the insurrection existed "and the citizens thereof, and the citizens of the rest of the United States," to be unlawful, so long as such condition of hostility should continue, and that "all goods and chattels, wares and merchandise," coming from such states into other parts of the United States, or proceeding to such states by land or water, together with the vessel or vehicle conveying them, or conveying persons to or from such states, without the license of the President, should be forfeited to the United States. 12 U. S. Sts. at Large, 257, 1262; 13 Id. 731.

The judge presiding at the trial ruled that the contracts sued on were legal, and the jury having returned a verdict for the plaintiff, the question of the correctness of this ruling is reported for our decision; the parties agreeing that, if the ruling was correct, the case shall be sent to an assessor; but, if incorrect, judgment shall be entered for the defendant.

This case presents a very interesting question, requiring for its decision a consideration of fundamental principles of international law.

[*Here follows—pp. 562–572 of the official report—a review of authorities.*]

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy.

Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent's Com. 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. *Conn. v. Penn*, Pet. C. C. 496; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *Ward v. Smith*, 7 Wall. 447; *Buchanan v. Curry*, 19 Johns. 137. The same reasons cover an agreement made in the enemy's territory to pay money there out of funds accruing there and not agreed to be transmitted from within our own territory; for, as was said by the Supreme Court of New York in the case last cited, "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy."

Public international law, being the rule which governs the intercourse of one nation and its subjects with other nations and their subjects, is ordinarily limited, so far as rights of property and contracts are concerned, to movable, or, in the phrase of the common law, personal property, which is in its nature capable of being carried or transmitted from one country to the other; and does not usually touch private interests in immovable property or real estate; although any government may doubtless, by express law or edict, appropriate or confiscate for its own benefit the use, the profits, or even the title, of land within its own territory or occupation, belonging to subjects of the enemy. 3 Phillimore's International Law,



135, 731; *Reed v. Reed*, 1 Munf. 619; *Smith v. Maryland*, 6 Cranch. 286; *Fairfax v. Hunter*, 7 Cranch. 622, 623, 631; *Union Insurance Co. v. United States*, 6 Wall. 759. The title of aliens in real estate is usually left to be regulated by the municipal law, and, under our system of government, by the laws of the several states, except so far as controlled by treaties with foreign powers. *Chirac v. Chirac*, 2 Wheat. 259; *Spratt v. Spratt*, 1 Pet. 343; s. c., 4 Pet. 393; *Bona-parte v. Camden & Amboy Railroad Co.*, Bald. 205; *Montgomery v. Dorion*, 7 N. H. 475; 2 Kent's Com. 70, 71.

By the common law, as declared by the American courts, an alien may take land by purchase, either by grant or by devise, and hold or convey the title, or in times of peace recover it by suit, subject in either case to be divested by inquest of office. *Fairfax v. Hunter*, 7 Cranch. 603; *Craig v. Radford*, 3 Wheat. 594; *Doe v. Robertson*, 11 Wheat. 332; *Sheaffe v. O'Neil*, 1 Mass. 256; *Fox v. Southack*, 12 Mass. 143; *Wilbur v. Tobey*, 16 Pick. 179, 180; *Waugh v. Riley*, 8 Met. 290; 2 Kent's Com. 61. It would seem to be a necessary corollary from this, and such is the better opinion, that he may, unless restrained by statute, take and hold a lease of real estate, at least until office found. Co. Lit. 2 b and Hargrave's notes; 2 Kent's Com. 61, 62.

In regard to real estate there is no difference between an alien friend and an alien enemy, except that the latter cannot maintain an action to recover it while the war lasts, and that it may be confiscated by an extraordinary act of the government. In the great case of *Hunter v. Fairfax*, 1 Munf. 218, and 7 Cranch. 603, better known as *Martin v. Hunter*, 1 Wheat. 304, the highest courts of Virginia and of the United States, though they differed upon the questions whether the latter had jurisdiction of the case, and whether there had been proceedings equivalent to an inquest of office, were in accord upon this point; and it was admitted in the Court of Appeals of Virginia, and adjudged by the Supreme Court of the United States, that a British subject, being an alien enemy, could take lands by devise from a citizen during the revolutionary war. In the Court of Appeals, Judge Fleming said: "I believe it is not, or ought not, to be controverted at this day, that an alien may take land within the commonwealth by purchase, as well by devise as by grant or other conveyance, and hold the same until something further be done to divest him of his right, to wit, office found." 1 Munf. 233. And Judge Roane said: "The right of the commonwealth to lands purchased by an alien is an ordinary right derived from the common law. It exists at all times. It is independent of, and does not arise out of a state of war." It results from a mere municipal regula-



tion. It accrues not because the person purchasing is an enemy, but because he is an alien. It is not a right pointed against the subjects of a particular power with whom we may chance to be at war, but against the subjects of all foreign nations whatsoever." Id. 226, 618. Mr. Justice Story, in delivering the opinion of the majority of the Supreme Court of the United States, stated the law upon this point thus: "It is clear by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the Year Books, and has been uniformly recognized as sound law from that time. Nor is there any distinction whether the purchase be by grant or devise. In either case the estate vests in the alien; not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. But until the lands are so seized, the alien has complete dominion over the same." "We do not find that, in respect to these general rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. But as to capacity to purchase, no case has been cited in which it has been denied." "Indeed, the common law in these particulars seems to coincide with the *jus gentium*." 7 Cranch, 619, 620. Mr. Justice Johnson agreed with the rest of the court upon this question, and said, "The disability of an alien to hold real estate is the result of a general principle of the common law, and was in no wise attached to the individual on account of his conduct in the revolutionary struggle." Ib. 628 *et seq.* And the doctrine that an alien enemy might acquire title in lands by purchase during the war was again distinctly recognized and affirmed in *Craig v. Radford*, 3 Wheat. 594. See, also, *Jackson v. Clarke*, Ib. 1, and note; *Stephen v. Swann*, 9 Leigh, 414, 415; *Yeo v. Mercereau*, 3 Harrison, 397.

In a civil war, it is well settled that the sovereign has belligerent as well as sovereign rights against his rebel subjects, and may exercise either at his discretion. *Rose v. Himely*, 4 Cranch, 272. *The Amy Warwick*, 2 Sprague, 123; s. c., and other prize cases, 2 Black, 635; *Alexander's Cotton*, 2 Wallace, 419. The act of congress and the proclamations of the president upon which the defendant relies in this case are in terms limited to the prohibition of commercial intercourse and the conveyance or transmission of goods and merchandise between the territories occupied by the two belligerents;

and thus clearly manifest the intention of the government, in accordance with what we have seen to be the general law of nations, that commercial intercourse, and commercial intercourse only, should be prohibited. They clearly do not extend to agreements made in the enemy's territory between two persons being there, for the leasing of real estate therein, the payment of rent there out of the products of the land, or the delivery of and payment for personal property already upon the demised premises and to be used thereon. The scope and meaning of the words may be illustrated by referring to the equivalent words in that article of the Constitution which confers upon congress "power to regulate commerce with foreign nations, and among the several states," which describe, as Chief Justice Marshall says, "the commercial intercourse between nations and parts of nations, in all its branches," and "every species of commercial intercourse between the United States and foreign nations." *Gibbons v. Ogden*, 9 Wheat. 190, 193. No one would contend that congress, under the power to regulate commerce, could legislate about conveyances or leases of land or the transfer of money or personal property within a state.

The lease now in question was made within the rebel territory, where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. No agreement appears to have been made as part of or contemporaneously with the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents; and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn.

We need not, therefore, consider the questions, argued at the bar,

upon the effect of the military occupation of a portion of the state of Mississippi by the national forces, or of the license to the plaintiff from the military commander.

Judgment for the plaintiff; case referred to an assessor

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2. CAPACITY TO SUE AND BE SUED.

ALVEY, J., IN *DORSEY v. THOMPSON*.

37 MD. 25, 39.—1872.

IT is certainly true that an alien enemy is incapable of suing and maintaining a suit, either at law or in equity, in the courts of the country to which he is hostile, during the state of hostilities; but this disability is personal to the plaintiff, and is designed to take from the enemies of the government the benefit of its courts. *Daubigney v. Davallon*, 2 Anst. 462; *Sparenburgh v. Bannatyne*, 1 Bos. & Pul. 163; *Society, etc. v. Wheeler*, 2 Gall. 105; 1 Daniel, Ch. Pra. and Plea, 58; Story's Eq. Plea. sec. 53. There may be auxiliary reasons for the rule founded on policy; but in reference to this judges have not agreed in opinion. In the case of *Sparenburgh v. Bannatyne*, 1 Bos. & Pul. 170, Chief Justice Eyre, in speaking of the ground upon which the plea of alien enemy is founded, said: "As to the ground of policy which has been taken in argument for the defendant, namely, that a benefit would result to the enemy from the plaintiff's recovering, it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and jurisdiction of our courts. Such is the case of an outlaw." The plea of an alien enemy, however, is greatly disfavored by the courts, and all presumptions are generally indulged against it; (8 T. Rep. 166; 2 Gall. 127); and where the disability of alien enemy occurred before judgment, and to a *scire facias* on the judgment the plaintiff's disability was pleaded, the plea was disallowed because it had not been availed of to the original action; the plaintiff having been allowed to recover judgment, his disability could not be set up to defeat execution on it. *West v. Sutton*, 2 Ld. Raym. 853. The defence is technical, and is only

allowed when formally and strictly pleaded to the maintenance of the suit. 1 Chit. Pl. 234.

But whether the ground of the defence of alien enemy be the possible benefit that might result to the enemy from allowing the plaintiff to recover, or the want of claim or right to the use of the courts of the country by the plaintiff, in consequence of his status as an enemy, the reason that creates the disability of the party as plaintiff does not apply to him as defendant. As plaintiff, the party attempts to exercise a privilege that he has forfeited, at least for the time; but, as defendant, he is sought to be made amenable for what justice may require of him. The mode and manner of acquiring jurisdiction, and making the proceedings binding on him, is another and different question from that of his total exemption from suit pending hostilities. This depends upon the remedial processes of the courts; and, as is well known, they are generally inadequate during a state of actual war in suits in *personam*, to furnish the foundation for exercising jurisdiction over alien enemies residing in the enemy's territory. But still these enemies are liable to be sued, if within the reach of process.

Indeed, that an alien enemy is liable to be sued in the courts of the hostile country would seem to be a settled principle of law. It has been so expressly decided by this court in the case of *Dorsey v. Kyle*, 30 Md. 512; and it has been recently so decided by the Supreme Court of the United States in the case of *McVeigh v. U. S.*, 11 Wall. 259, 267. In this latter case, the court said: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." Bacon's Abr., tit. Alien, D., is quoted from, in which it is said that an alien enemy may be sued at law, and may have process to compel the appearance of his witnesses. See, also, *Albretcht v. Sassman*, 2 Ves. & B. 323.



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